RECORD AND BRIEFS

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No.

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IN THE

Supreme Court of the United States

ERIK LINDSEY HUGHES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court explained in *Marks v. United States*, 430 U.S. 188, 193 (1977), that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" In *Freeman v. United States*, 564 U.S. 522 (2011), the Court issued a fractured 4-1-4 decision concluding that a defendant who enters into a plea agreement under Fed. R. Crim. P. 11(c)(1)(C) may be eligible for a reduction in his sentence if the Sentencing Commission subsequently issues a retroactive amendment to the Sentencing Guidelines. But the four-Justice plurality and Justice Sotomayor's concurrence shared no common rationale and the courts of appeals have divided over how to apply *Freeman*'s result.

The questions presented are:

1. Whether this Court's decision in *Marks* means that the concurring opinion in a 4-1-4 decision represents the holding of the Court where neither the plurality's reasoning nor the concurrence's reasoning is a logical subset of the other.

2. Whether, under *Marks*, the lower courts are bound by the four-Justice plurality opinion in *Freeman*, or, instead, by Justice Sotomayor's separate concurring opinion with which all eight other Justices disagreed.

3. Whether, as the four-Justice plurality in *Freeman* concluded, a defendant who enters into a Fed. R. Crim. P. 11(c)(1)(C) plea agreement is generally eligible for a sentence reduction if there is a later, retroactive amendment to the relevant Sentencing Guidelines range.

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INTRODUCTION

Every regional circuit has weighed in on a question that has them irreconcilably split, 10-2. And the only reason they are split is that this Court has never resolved a foundational question about a situation where this Court resolves a case without a majority opinion. In *Marks v. United States*, 430 U.S. 188 (1977), this Court directed lower courts to follow the opinion representing the "narrowest grounds." But this Court has never explained what to do when the opinions are not narrower or broader, but just *different*.

As this Court has observed, in the 40 years since *Marks* was decided, its rule has been "more easily stated than applied." *Nichols v. United States*, 511 U.S. 738, 745 (1994). The lower courts are hopelessly confused over how to apply *Marks*, which has led to several different circuit splits. Among them is the split implicated here over what to make of the fragmented decision in *Freeman v. United States*, 564 U.S. 522 (2011). In *Freeman*, this Court splintered on the circumstances under which a defendant can seek a sentence reduction when the Sentencing Commission reduces the Guidelines range.

This Court should address the *Marks* question now: It matters for Mr. Hughes and for other criminal defendants, and it matters more generally for courts attempting to determine which rule of law to follow in several areas in which this Court has issued a fragmented decision. Indeed, this Court has granted certiorari on at least three prior occasions to resolve a specific question for a *second* time because the lower

courts could not derive the precedential rule from the original fragmented decision.

The Circuits are expressly and irrevocably split on the application of *Marks* to *Freeman*. And unlike previous petitions that raised the *Freeman* issue and were denied, this case presents a clean vehicle. This Court should grant this petition, so that Mr. Hughes and other similarly situated criminal defendants can have their eligibility for a sentence reduction properly determined under *Freeman*, and so that the application of *Marks* can be clarified more generally.

OPINIONS AND ORDERS BELOW

The decision of the Court of Appeals is reported at 849 F.3d 1008. Pet. App. 1a-15a. The district court's ruling on the sentence modification motion is unreported. Pet. App. 16a-30a.

JURISDICTION

The Court of Appeals entered judgment on February 27, 2017. Pet. App. 1a. On May 22, 2017, Justice Thomas extended the time for filing this petition for certiorari to and including July 27, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

18 U.S.C. § 3582(c)(2) provides as follows:

> The court may not modify a term of imprisonment once it has been imposed except that ...

> in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

Federal Rule of Criminal Procedure 11(c)(1)(C) provides as follows:

> (c) Plea Agreement Procedure.
>
> (1) In General. An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:
>
> ...
>
> (C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or

sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

STATEMENT OF THE CASE

This Court Issues A 4-1-4 Decision In Freeman.

This case arises out of the interplay between a statutory provision about sentence reductions and a criminal procedure rule. The statute is 18 U.S.C. § 3582(c)(2), which provides that if the defendant's sentence is "based on" the Sentencing Guidelines, the defendant is eligible for a sentence reduction when the Sentencing Commission later retroactively lowers the Guidelines range applicable to the defendant's offense. The rule is Fed. R. Crim. P. 11(c)(1)(C), which provides that a defendant may enter into a plea agreement providing that a specific sentence is the appropriate disposition of his case. If the court accepts such a plea agreement, known as a "C-type agreement," the agreed-upon sentence binds the court. This Court tried—and failed—to authoritatively resolve the question whether, and under what circumstances, a plea agreement under Fed. R. Crim. P. 11(c)(1)(C) is eligible for a sentence reduction when the applicable sentencing range under the Sentencing Guidelines is subsequently lowered—i.e., when is the plea agreement "based on" the Sentencing Guidelines?

This Court ruled that the defendant in that case was eligible for a sentence reduction, but the Court did so in a divided 4-1-4 decision. *Freeman v. United States*, 564 U.S. 522 (2011). The four-Justice plurality explained that a district court generally has authority

to reconsider the sentence of a defendant who entered into a C-type plea agreement where later amendments to the Sentencing Guidelines reduce the applicable sentencing range for his crime of conviction, if the sentencing judge's decision to accept the plea agreement was based on the relevant Guidelines. *Freeman*, 564 U.S. at 534. The plurality's focus was on the judge's acceptance of the plea agreement.

Justice Sotomayor concurred in the judgment but "differ[ed] as to the reason why." *Id.* (Sotomayor, J., concurring). She held that the proper focus is on what the parties agreed to: In Justice Sotomayor's view, a court may reconsider a sentence in this context only if the plea agreement "expressly uses a Guidelines sentencing range applicable to the charged offense to establish the [agreed-upon] term of imprisonment, and that range is subsequently lowered by the United States Sentencing Commission." *Id.* Although Justice Sotomayor broke the tie in favor of the defendant, her reasoning was not endorsed by any other Justice. *See id.* at 544 (Roberts, C.J., dissenting) ("The plurality and the opinion concurring in the judgment agree on very little except the judgment.").

Mr. Hughes Enters Into A Plea Agreement Under Fed. R. Crim. P. 11(c)(1)(C) And Is Sentenced To 180 Months In Prison.

In 2013, a federal grand jury returned an indictment charging Erik Hughes with four counts of drug and firearm offenses. Pet. App. 3a; Pet. App. 16a-17a. After "negotiations between the parties and in exchange for the government dismissing otherwise provable counts against the Defendant," Mr. Hughes

entered into a plea agreement pursuant to Fed. R. Crim. P. 11(c)(1)(C). Pet. App. 54a. Under the agreement, Mr. Hughes pled guilty to Counts One and Three: conspiracy to possess with intent to distribute at least 500 grams of methamphetamine, and being a felon in possession of a firearm. Pet. App. 3a.

The plea agreement provided "that the Court should impose a sentence of 180 months of imprisonment as the appropriate custodial sentence in this case." Pet. App. 54a. During "plea discussions, it was discussed that [Mr. Hughes's Sentencing] Guideline range was 188-235 months." Pet. App. 74a. The plea agreement contains numerous references to the Guidelines. *See, e.g.*, Pet. App. 54a ("The Defendant understands that ... the Court will be required to consider ... the provisions of the United States Sentencing Guidelines ..."); Pet. App. 55a ("[T]he Court may still consider the conduct underlying such dismissed counts in determining relevant conduct under the Sentencing Guidelines ...."); *id.* ("Sentencing Guideline Recommendations"); Pet. App. 56a ("[T]he government also reserves the right to make recommendations regarding application of the Sentencing Guidelines."); *id.* ("[I]f ... additional evidence is sufficient to support a finding of a different application of the Guidelines ...."); Pet. App. 58a ("Pursuant to § 1B1.8 of the Sentencing Guidelines, the Government agrees that any self-incriminating information that was previously unknown to the Government ... will not be used in determining the applicable sentencing guideline range ....").

At the sentencing hearing, the district court determined Mr. Hughes's total offense level and his

criminal history category, and used those numbers to compute his recommended sentencing range under the Sentencing Guidelines—188 to 235 months. Pet. App. 36a. The court then explained that it "considered ... the sentencing guidelines," Pet. App. 32a-33a, and found that the agreed-upon sentence "complies ... with the[ir] spirit," Pet. App. 33a. The court accepted the plea agreement, and sentenced Mr. Hughes to 180 months in prison. Pet. App. 44a; *see* Fed. R. Crim. P. 11(c)(1)(C) (binding district court to recommended sentence if plea agreement is accepted).

The Sentencing Guidelines Are Amended To Lower The Applicable Sentencing Range, And The District Court Denies Mr. Hughes's Motion To Reduce His Sentence.

On July 18, 2014, the U.S. Sentencing Commission announced that Amendment 782 to the Sentencing Guidelines, which reduced the offense level for specified drug offenses by two levels, would go into effect on November 1, 2015, and would apply retroactively. Pet. App. 3a-4a; *see also* U.S. Sentencing Guidelines Manual § 1B1.10 (U.S. Sentencing Comm'n Nov. 2015). Under the amended guidelines, the recommended sentencing range for the offenses to which Mr. Hughes pled guilty would be 151 to 188 months. Pet. App. 4a; Pet. App. 75a.

After learning of the amendment to the Sentencing Guidelines, Mr. Hughes filed a motion to reduce his sentence pursuant to 18 U.S.C. § 3582(c)(2), which allows a court to reduce the term of imprisonment of "a defendant who has been sentenced ... based on a

sentencing range that has subsequently been lowered by the Sentencing Commission."[1] Pet. App. 71a-76a.

The district court denied Mr. Hughes's motion, Pet. App. 30a, holding that he was ineligible for a reduced sentence under Amendment 782 because the sentence in his binding plea agreement was not "based on" a sentencing guidelines range as required by § 3582(c)(2), Pet. App. 17a-18a. In so holding, the district court relied on Justice Sotomayor's concurring opinion in *Freeman*, which states that, in general, "the term of imprisonment imposed pursuant to a (C) agreement is, for purposes of § 3582(c)(2), 'based on' the agreement itself" rather than the Sentencing Guidelines. Pet. App. 21a (quoting 564 U.S. at 536). Under Justice Sotomayor's concurrence, where "a plea agreement ... provide[s] for a specific term of im-

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[1] According to the Sentencing Guidelines Manual, "the court shall not reduce the defendant's term of imprisonment ... to a term that is less than the minimum of the amended guideline range." U.S. Sentencing Guidelines Manual § 1B1.10(b)(2)(A). The only exception to this rule is when the defendant's sentence was initially reduced due to "substantial assistance to authorities." *Id.* at § 1B1.10(b)(2)(B). Here, Mr. Hughes requested that his sentence be reduced to 150 months (one month below the minimum of the amended guideline range), in accordance with a policy statement accompanying Amendment 782. Pet. App. 76a. Mr. Hughes argued that where a defendant has been sentenced to a term below the lower limit of the Sentencing Guidelines, "a reduction comparably less than the amended guidelines range ... may be appropriate." Pet. App. 75a (citing U.S. Sentencing Guidelines Manual § 1B1.10(b)(2)(B) (U.S. Sentencing Comm'n Nov. 2015)). But because Mr. Hughes did not qualify for the limited exception to the general rule, his sentence could be reduced to no less than 151 months.

prisonment," for the defendant to be eligible for a sentence reduction the agreement must "make clear that the basis for the specified term is a Guidelines sentencing range applicable to the offense to which the defendant pleaded guilty." *Id.* at 539. The district court held that, in this case, Mr. Hughes's "sentence was not linked or tied to the Sentencing Guidelines" because the plea agreement "does not mention an otherwise applicable Sentencing Guidelines range or Defendant's criminal history, and Defendant's criminal history category is not evident from the Agreement itself." Pet. App. 28a.

The Court Of Appeals Affirms, Expressly Noting The Existence Of A Deep And Entrenched Circuit Conflict.

The Court of Appeals affirmed, expressly noting the conflict among the circuits over which opinion in *Freeman* controls. Pet. App. 12a-15a. Rejecting the approach of the D.C. and Ninth Circuits, the court sided with "eight sister circuits," and held that "[a]s we see it, Justice Sotomayor's opinion provides a legal standard that produces results with which a majority of the Court in *Freeman* would agree because whenever Justice Sotomayor's opinion would permit a sentence reduction, the plurality opinion would as well." Pet. App. 9a, 12a-13a. As such, "Justice Sotomayor's opinion in *Freeman* provides the narrowest ground of agreement because her concurring opinion establishes the 'le[ast] far-reaching' rule." Pet. App. 8a.

In so holding, the court characterized as "misplaced" the contrary rulings of the D.C. and Ninth

Circuits that "Justice Sotomayor's concurring opinion does not provide the narrowest ground of agreement in *Freeman*" because it does not constitute a "'logical subset' of another, broader opinion." Pet. App. 9a-10a (citing *United States v. Davis*, 825 F.3d 1014, 1021-22 (9th Cir. 2016) (en banc); *United States v. Epps*, 707 F.3d 337, 350 (D.C. Cir. 2013)).

The Court of Appeals on this basis agreed with the district court that Mr. Hughes "is not eligible for a sentence reduction," because the plea agreement "does not make any recommendation about a specific application of the Sentencing Guidelines, [it] does not calculate [Mr.] Hughes's range or discuss factors that must be used to determine that range, such as [Mr.] Hughes's criminal history[, n]or does it set the agreed-upon sentence within the applicable guideline range." Pet. App. 14a-15a.

REASONS FOR GRANTING THE WRIT

I. One Circuit Split Over *Marks* Has Led To Another Circuit Split Over *Freeman*.

The courts of appeals are hopelessly divided over how to analyze fragmented decisions of this Court in light of the *Marks* "narrowest grounds" of agreement rule. *See, e.g.*, Ryan C. Williams, *Questioning* Marks*: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795, 799 (2017) ("The conceptual confusion surrounding *Marks* presents an important practical challenge for lower courts."). Disagreement over *Marks* has, in turn, caused an irreconcilable division in the courts of appeals over the *Freeman* question.

All twelve regional circuits[2] have now interpreted *Freeman* in light of *Marks* to determine whether Justice Sotomayor's concurrence is controlling as the "narrowest grounds" of agreement. The Eleventh Circuit here joined nine sister circuits to hold that it is. The D.C. and Ninth Circuits, on the other hand, hold that there is no controlling opinion but apply the plurality opinion on the ground that it provides the most persuasive analysis. This Court should resolve the *Freeman* question to ensure that federal prisoners are not forced to endure overly long sentences based on the happenstance of where their crimes were committed and where they were prosecuted and sentenced. This Court should also clarify its holding in *Marks* more generally and provide guidance to lower courts struggling to interpret fragmented Supreme Court decisions.

A. The circuits are split over how to apply *Marks* to this Court's fragmented decisions.

In *Marks*, this Court held that, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds ....'" 430 U.S. at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ)). In applying that rule to the case before it, the Court explained that the plurality opinion in

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[2] The Federal Circuit is the only court of appeals that has not reached the *Freeman* issue and, of course, it never will.

Memoirs v. Massachusetts, 383 U.S. 413 (1966), controlled the specific issue in *Marks* because the concurrences rested "on broader grounds in reversing the judgment below." *Marks*, 430 U.S at 193. The plurality opinion in *Memoirs* was therefore fully subsumed within the concurring analysis, and a majority of the Court agreed upon a rationale that led to the result.

But the *Marks* Court did not address what happens when the plurality and concurrence agree on the judgment but not on any aspect of the underlying rationale. In the years that have followed, the courts of appeals have taken sharply divergent approaches to this question.

The D.C. Circuit, for example, has explained that "*Marks* is workable ... only when one opinion is a logical subset of other, broader opinions." *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc). When there is "no practical middle ground between" the plurality and the concurrence, *United States v. Epps*, 707 F.3d 337, 348-49 (D.C. Cir. 2013), no decision "can be meaningfully regarded as 'narrower,'" *King*, 950 F.2d at 781, and it is appropriate to "consider ... which, if any, of the rationales" in those opinions "is persuasive," *Epps*, 707 F.3d at 351.

The Ninth Circuit agrees. "A fractured Supreme Court decision should only bind the federal courts of appeal[s] when a majority of the Justices agree upon a single underlying rationale and one opinion can reasonably be described as a logical subset of the other." *Davis*, 825 F.3d at 1021-22. Accordingly, "[w]hen no single rationale commands a majority of the Court, only the specific result is binding on lower federal

courts." *Id.* at 1022. In the Ninth Circuit's view, the focus is on "whether the reasoning of a narrower opinion fit[s] entirely into the circle drawn by a broader opinion in order to derive a rule." *Id.* at 1021.

Other courts of appeals, however, including the Eleventh Circuit here, have adopted an approach focused on the results yielded by each opinion. These courts hold that the controlling opinion is the one that "will necessarily produce *results* with which a majority of the Court from that case would agree." Pet. App. 12a (internal quotation marks omitted) (emphasis in original). *See also, e.g., Planned Parenthood of Se. Pennsylvania v. Casey*, 947 F.2d 682, 694 (3d Cir. 1991) (finding Justice O'Connor's concurring opinions in *Webster v. Reproductive Health Services*, 492 U.S. 490, 530 (1989) and *Hodgson v. Minnesota*, 497 U.S. 417, 458-60 (1990), controlling because a majority of Justices would have agreed with the result under her concurrences), *aff'd in part, rev'd in part on other grounds*, 505 U.S. 833 (1992); *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1182 (2d Cir. 1992) ("In essence, what we must do is find common ground shared by five or more justices."); *United States v. Johnson*, 467 F.3d 56, 64 (1st Cir. 2006) (applying the results-oriented test where there are no identifiable "narrowest grounds" under the logical subset test).

Unless and until this Court clarifies *Marks*, the lower courts will be forced to continue to divine with no guidance which opinion is controlling whenever this Court issues a fragmented decision with a plurality and concurring opinions, a not uncommon occurrence that can implicate highly consequential cases. *Infra* § II.A. Indeed, "during the 54 terms from 1953

to 2006, th[is] Court issued 195 plurality opinions." James F. Spriggs, II & David R. Stras, *Explaining Plurality Decisions*, 99 GEO. L.J. 515, 519 (2011).

The divergence in the circuits' approaches has led to explicit disagreements over the holdings of specific decisions of this Court. For example, in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), the Court held that retroactive application of the Coal Industry Retiree Health Benefit Act of 1992 to Eastern Enterprises was unconstitutional. Justice O'Connor authored the plurality opinion, holding that the Act was unconstitutional under the Fifth Amendment's Takings Clause. *See id.* at 503-04 (plurality op.). Justice Kennedy concurred in the result—that the Act was unconstitutional—but rejected the plurality's rationale, instead relying on the Due Process Clause. *Id.* at 539 (Kennedy, J., concurring in the judgment and dissenting in part).

Because there is no clear majority rule, the courts of appeals are split as to what constitutes a taking under *Eastern Enterprises*. The Second and Sixth Circuits—like the D.C. and Ninth Circuits applying *Freeman*—find no controlling opinion in *Eastern Enterprises* because the concurrence is not a "logical subset" of the plurality opinion. *See United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003); *Franklin Cty. Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 552 (6th Cir. 2001). Therefore, "[t]he only binding aspect of such a splintered decision is its specific result, and so the authority of *Eastern Enterprises* is confined to its holding that the Coal Act is unconstitutional as applied to Eastern Enterprises." *Alcan*, 315 F.3d at 189.

In contrast, the First Circuit has determined that *Eastern Enterprises* has a much broader stare decisis effect. *Parella v. Ret. Bd. of the Rhode Island Emps.' Ret. Sys.*, 173 F.3d 46, 58 (1st Cir. 1999). According to the *Parella* court, *Eastern Enterprises* stands for the proposition that the Takings Clause applies only if the plaintiff identifies an established property right because that was the common ground for the "majority of [J]ustices"—Justice Kennedy and the four dissenting Justices. *Id.*

Rapanos v. United States, 547 U.S. 715 (2006) is similar. *Rapanos* is a 4-1-4 plurality decision addressing the scope of the EPA's authority to regulate wetlands. Justice Scalia's plurality opinion articulated a test under which federal regulatory jurisdiction would apply only to certain wetlands. *Id.* at 742. Justice Kennedy concurred in the judgment, but would apply a "significant nexus" test to determine federal regulatory jurisdiction. *Id.* at 779-83 (Kennedy, J., concurring in the judgment). Chief Justice Roberts' concurrence invited the EPA to engage in notice-and-comment rulemaking about the scope of federal power over wetlands, to which he would then give generous leeway. *Id.* at 757-58 (Roberts, C.J., concurring). Finally, Justice Stevens wrote a dissent, advocating that federal regulatory jurisdiction could be asserted either by applying the "significant nexus" test or by meeting the plurality's standard. *Id.* at 810 (Stevens, J., dissenting).

Not surprisingly, the circuits are split over how to apply *Rapanos*. *Compare Johnson*, 467 F.3d at 66 (First Circuit holding that the Government has jurisdiction if it satisfies the plurality or concurring test);

with United States v. Robison, 505 F.3d 1208, 1221-22 (11th Cir. 2007) (Eleventh Circuit accepting only the concurrence's test because it was the least "far-reaching" among the rationales that supported the judgment).

Freeman is yet another example of a 4-1-4 fragmented decision that has hopelessly divided the courts of appeals on how to apply *Marks*. *Infra* § I.B.

As these examples illustrate, this Court's review is urgently needed to address the courts of appeals' confusion over the meaning of *Marks*—which set forth a "test ... more easily stated than applied." *Nichols v. United States*, 511 U.S. 738, 745 (1994).

B. The 10-2 *Freeman* split sharply underscores the courts of appeals' disagreement over *Marks*.

Nowhere is the court of appeals' disagreement over *Marks* more evident than in their division over *Freeman*, where the circuits are split 10-2 over whether Justice Sotomayor's concurrence or the plurality's approach controls. As such, whether a prisoner is eligible for a reduced sentence in light of changes to the Sentencing Guidelines is determined in large part by the happenstance of geography. A ruling on the *Freeman* issue would not only provide much-needed clarity to criminal sentencing law but, more broadly, guidance on the correct approach to analyzing fragmented decisions of this Court.

The D.C. Circuit and the Ninth Circuit have applied the "logical subset" test to conclude that no single rationale in *Freeman* controls. *Davis*, 825 F.3d at 1021-22; *Epps*, 707 F.3d at 350-51. According to the D.C. Circuit, under *Marks* the "narrowest opinion must represent a common denominator of the Court's *reasoning*; it must embody a position implicitly approved by at least five Justices who support the judgment." *Epps*, 707 F.3d at 348 (citations omitted) (emphasis in original). But "there is no controlling opinion in *Freeman* because the plurality and concurring opinions do not share common reasoning whereby one analysis is a 'logical subset' of the other." *Id.* at 350 (citation omitted). The D.C. Circuit also elaborated that, under the *Freeman* concurrence, courts "examine the intent of the parties ... to determine whether a [C-type plea] sentence" is "'based on'" the Guidelines. *Id.* And, according to the *Freeman* plurality, this parties-focused approach "is fundamentally incorrect because § 3582(c)(2) 'calls for an inquiry into the reasons for a judge's sentence, not the reasons that motivated or informed the parties.'" *Id.* (quoting *Freeman*, 564 U.S. at 533 (plurality op.)). Against this backdrop, the D.C. Circuit reasoned that because "the set of cases where the defendant prevails under the concurrence is not always nestled within the set of cases where the defendant prevails under the plurality," Justice Sotomayor's opinion cannot control. *Id.* at 351.

The en banc Ninth Circuit has reached the same conclusion, explicitly rejecting the notion that Justice Sotomayor's concurrence was the lowest common denominator in *Freeman*, because "there are some circumstances where defendants would be eligible for

relief under Justice Sotomayor's approach but not under the plurality's." *Davis*, 825 F.3d at 1024. With no controlling opinion in *Freeman*, the Ninth Circuit was "restricted only by the ultimate result in *Freeman*: that defendants sentenced under Rule 11(c)(1)(C) agreements are not categorically barred from seeking a sentence reduction under § 3582(c)(2)." *Id.* at 1026.

These two circuits—the D.C. and Ninth Circuits—have thus found the *Freeman* plurality opinion more persuasive and on that basis have allowed district court reconsideration of defendants' sentences. *Id.*; *Epps*, 707 F.3d at 351-53.

In contrast, ten other circuits, including the Eleventh Circuit in this case, have concluded that Justice Sotomayor's concurring opinion in *Freeman* controls because it reflects the narrowest *result*. *See* Pet. App. 10a-13a; *United States v. Rivera-Martínez*, 665 F.3d 344, 348 (1st Cir. 2011); *United States v. Howell*, 541 F. App'x 13, 14 (2d Cir. 2013); *United States v. Thompson*, 682 F.3d 285, 290 (3d Cir. 2012); *United States v. Brown*, 653 F.3d 337, 340 n.1 (4th Cir. 2011); *United States v. Benitez*, 822 F.3d 807, 811 (5th Cir. 2016); *United States v. Smith*, 658 F.3d 608, 611 (6th Cir. 2011); *United States v. Dixon*, 687 F.3d 356, 359 (7th Cir. 2012); *United States v. Browne*, 698 F.3d 1042, 1045 (8th Cir. 2012); *United States v. Graham*, 704 F.3d 1275, 1277-78 (10th Cir. 2013).

These courts hold that Justice Sotomayor's opinion reflects the "narrowest grounds" under *Marks* because, in their view, every Justice in the *Freeman* plurality would agree that the defendant is eligible for a sentence reduction when a C-type plea agreement

expressly uses a Guidelines sentencing range to establish the length of the sentence imposed. *See, e.g.*, *Brown*, 653 F.3d at 340 n.1.

In light of the above-cited case law, there is no need at this point for additional percolation in the lower courts. The regional courts of appeals have all addressed the *Freeman* question and they are sharply and irrevocably divided. At this point, "further consideration of the substantive and procedural ramifications of the problem by other courts will [not] enable [this Court] to deal with the issue more wisely at a later date." *McCray v. New York*, 461 U.S. 961, 962 (1983) (Stevens, J., opinion respecting denial of certiorari).

II. The Questions Presented Are Important And Recurring.

A. The questions presented are important.

As explained above, *supra* § I.A, the *Marks* question arises not just in the context of *Freeman* sentencing cases, but also potentially in every area of law where this Court may issue a fragmented decision. Some of this Court's most significant cases—involving

such issues as abortion,[3] gun control,[4] voting rights,[5] affirmative action,[6] capital punishment,[7] and the scope of congressional authority under the Commerce Clause[8]—have been decided by a plurality decision. The proper interpretation of a plurality decision may also implicate any number of other issues in areas such as criminal procedure,[9] personal jurisdiction,[10]

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[3] *Planned Parenthood*, 505 U.S. 833 (Pennsylvania informed consent law); *Webster*, 492 U.S. 490 (Missouri abortion restrictions).

[4] *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (incorporation of Second Amendment against state governments).

[5] *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008) (Indiana voter identification law).

[6] *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (racial preferences in public contracting); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (racial preferences in higher education).

[7] *Baze v. Rees*, 553 U.S. 35 (2008) (permissible methods of capital punishment); *Gregg*, 428 U.S. 153 (capital punishment's constitutionality).

[8] *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) (Congress's authority to require individuals to acquire health insurance).

[9] *Williams v. Illinois*, 567 U.S. 50 (2012) (whether statements prepared in the course of an investigation were "testimonial" for purposes of the Sixth Amendment's Confrontation Clause).

[10] *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011) (whether a defendant may be subject to the jurisdiction of the courts of the United States but not of any particular State).

class certification,[11] and federal preemption of state law.[12] *See* Williams, 69 STAN. L. REV. at 800-01.

Resolving the holding in *Freeman* would control the outcome of this case, but resolving the broader question would also assist the lower courts in grappling with *Marks* in other important settings. The Court should clarify the *Marks* rule, for the benefit of Mr. Hughes and similarly situated criminal defendants, and also for the benefit of other parties litigating a diverse range of issues under fragmented Supreme Court authority.

Regarding the specific context of this case—where Justice Sotomayor's *Freeman* concurrence affects a large number of inmates both now and into the future—retroactive Sentencing Guidelines amendments are not uncommon. *See* U.S.S.G. § 1B1.10(d) (listing 29 retroactive amendments to date).[13] For example, the amendment analyzed in *Freeman* was different than the one at issue here. *See* 564 U.S. at 528 (plurality op.) (discussing amendment

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[11] *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393 (2010) (whether a state legislature can prohibit federal courts from using a federal class action rule for a state law claim).

[12] *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996) (whether the Medical Device Amendments of 1976 preempt state common-law negligence action).

[13] *See* U.S.S.G. § 1B1.10(d) ("Amendments covered by this policy statement are listed in Appendix C as follows: 126, 130, 156, 176, 269, 329, 341, 371, 379, 380, 433, 454, 461, 484, 488, 490, 499, 505, 506, 516, 591, 599, 606, 657, 702, 706 as amended by 711, 715, 750 (parts A and C only), and 782 (subject to subsection (e)(1)).").

706, which remedied disparities between penalties for cocaine base and powder cocaine offenses). Not only has the Sentencing Commission freely amended the Guidelines in the past, but it continues to do so, and the Commission not infrequently gives its amendments retroactive effect. *See, e.g.*, U.S. Sentencing Comm'n, Proposed Amendments to the Sentencing Guidelines at ii (Dec. 19, 2016) (requesting "public comment" regarding whether "any proposed amendment published in this document should ... be applied retroactively to previously sentenced defendants").

Incarcerated prisoners routinely file motions seeking a reduction in sentence because the Sentencing Guidelines were amended. According to an October 2016 Sentencing Commission report, 567 motions for sentence reductions based on Amendment 782 alone were denied in light of a "binding plea" in a period of just 700 days (Nov. 1, 2014 to Sept. 30, 2016). *U.S. Sentencing Comm'n, 2014 Drug Guidelines Amendment Retroactivity Data Report* Table 1 (Oct. 2016), *available at* http://tinyurl.com/USSC2014 (last visited July 23, 2017). The issue is ubiquitous, and will continue to arise as long as defendants sign C-type plea agreements and the Commission regularly amends the Sentencing Guidelines with retroactive effect.

Finally, there can be no doubt about the importance of the underlying merits question that *Freeman* failed to resolve authoritatively. This Court has already granted certiorari on that question. And it is no less important now than it was then. While the Court may well reach the same impasse as it did before, it is also possible that with the passage of time

and the further experience of 12 circuits, this Court could reach a resolution that was once elusive. That has certainly happened before. *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003); *Nichols*, 511 U.S. 738; *Bakke*, 438 U.S. 265. So we thought it prudent to give this Court the option of trying again. Should this Court grant the third question presented, it should be no surprise that our merits brief will press the position of the four-Justice plurality in *Freeman*: that "[w]here the decision to impose a sentence is based on a range later subject to retroactive amendment, § 3582(c)(2) permits a sentence reduction" and there is "no support in § 3582(c)(2), Rule 11(c)(1)(C), or the relevant Guidelines policy statements" for the "categorical bar enacted by the Court of Appeals" there with respect to C-type plea agreements. 564 U.S. at 525-26.

B. The questions presented are recurring.

To date, *Marks* has led this Court, on at least three occasions, to address an issue twice because lower courts inconsistently applied the Court's original, fractured decision. In *City of Burlington v. Dague*, 505 U.S. 557, 559 (1992), for example, the Court examined a "question [] essentially identical to the one [the Court] addressed" previously in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987). In *Nichols*, this Court recognized that confusion arising from the fragmented decision in *Baldasar v. Illinois*, 446 U.S. 222 (1980) was, again, requiring it to "reexamin[e] that decision." *Nichols*, 511 U.S. at 746. And in *Grutter*, 539 U.S. at 325, this Court recognized that the courts of appeals were split over the question of

which opinion, if any, controlled with respect to the divided decision in *Bakke*, 438 U.S. 265, thereby compelling the Court to take up the issue again and revisit the question presented. And because of the frequency of plurality decisions issued by the Court, lower courts will continue to face *Marks*-related questions until this Court clarifies its meaning. Spriggs, 99 GEO. L. J. at 519; *id.* at 517-18 nn. 3-12.

The specific question of articulating the proper holding of *Freeman* has been the subject of recent certiorari petitions that this Court has denied.[14] In opposing those petitions, the government has suggested that the issue is not cert-worthy because it is "short-lived." *See, e.g.*, Brief in Opposition, *McNeese v. United States*, No. 16-66, 2016 WL 6082343, at *18 (U.S. Oct. 14, 2016). But one must look no further than the entrenched 10-2 circuit split to grasp the far-reaching and recurring nature of this issue. Although *Freeman* was decided only six years ago, every regional circuit has spoken to the question of what its holding is, most more than once. *See supra* § I.B.2; *see also, e.g.*, *United States v. Duvall*, 705 F.3d 479, 483 (D.C. Cir. 2013); *United States v. Austin*, 676 F.3d 924, 927 (9th Cir. 2012) *overruled by Davis*, 825 F.3d 1014; *United States v. Mitchell*, 500 F. App'x 802, 805

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[14] *See Negrón v. United States*, No. 16-999, 2017 WL 636003 (U.S. June 26, 2017); *Gilmore v. United States*, No. 16-7953, 2017 WL 661819 (U.S. June 19, 2017); *Sullivan v. United States*, No. 16-7182, 2017 WL 2621326 (U.S. June 19, 2017); *Blaine v. United States*, 137 S. Ct. 1329 (2017); *Fuentes v. United States*, 137 S. Ct. 627 (2017); *Chapman v. United States*, 137 S. Ct. 625 (2017); *McNeese v. United States*, 137 S. Ct. 474 (2016).

(11th Cir. 2012) (per curiam). This issue is not going away.

If this Court does not intervene, the current confusion regarding *Freeman*'s holding will continue to persist. This kind of discord is in direct conflict with the main purpose of the Sentencing Guidelines, which is to "reduce unwarranted disparities in federal sentencing." *Freeman*, 564 U.S. at 525; *Dorsey v. United States*, 567 U.S. 260, 264 (2012) ("uniformity" is a "basic Federal Sentencing Guidelines objective"). In fact, the circuit split here "permit[s] the very disparities the Sentencing Reform Act seeks to eliminate." *Freeman*, 564 U.S. at 533. Without this Court's intervention, appellate review will serve only to solidify sentencing differences, not "promote uniformity by tending to iron out sentencing differences." *Peugh v. United States*, 133 S. Ct. 2072, 2083 (2013) (internal quotations omitted). Moreover, as we have noted, clarifying the correct approach to analyzing *Freeman* would resolve not only an important area of sentencing law, but would also help to clarify more generally how to apply *Marks*' "narrowest grounds" rule, which has "baffled and divided the lower courts ...." *Nichols*, 511 U.S. at 746.

In opposing certiorari, the government has also argued that "because plea agreements can ... be drafted to avoid any controversies about whether the sentence set forth in such an agreement is 'based upon' the Guidelines," which "*Freeman* opinion[] controls" is not an issue that needs to be resolved. *See, e.g.*, Brief in Opposition, *McNeese*, 2016 WL 6082343, at *18. But that assertion is counter-factual. The government's plea agreements in the Northern District of

Georgia are not materially different today than they were when *Freeman* was decided over six years ago. The agreement in this case was drafted post-*Freeman* and included no such language. Moreover, cases will continue to arise where the defendant signed a C-type agreement and was sentenced pre-*Freeman*, but the controlling Guidelines range is later reduced.

As a practical matter, it is also not clear how, or if, the government's suggested drafting process would work, much less how it would operate on a uniform, nationwide basis. Notably, the government has only said that it "can" draft such plea agreements, *id.*, not that it actually does so or that it intends to do so. It cannot say that this process will work, because it has no control. A plea agreement, like any other sort of agreement, requires collaboration on both sides. The defendant would thus have to agree to waive any eligibility for a sentence reduction in the event of future amendments to the Sentencing Guidelines. It is unclear why the government expects that defendants would generally agree to such a waiver. For all of these reasons, there is no reason to anticipate that the government can somehow avoid the need for this Court's resolution of the issue through an altered approach to the drafting of Rule 11(c)(1)(C) plea agreements.

III. This Case Is An Ideal Vehicle For Answering The Questions Presented And Resolving The Underlying Circuit Conflicts.

This case presents the perfect opportunity for this Court to clarify *Marks* and determine whether Justice Sotomayor's concurrence in *Freeman* controls.

As the government has explained in opposing certiorari, the recent petitions that this Court has denied have featured substantial vehicle issues. Most notably, the prior cases have generally (1) waived any challenge to Justice Sotomayor's concurrence as the controlling opinion in *Freeman*;[15] and/or (2) presented circumstances where the petitioner's sentence was already below the amended sentencing range, was based on a range that was not in fact amended, or was otherwise not eligible for a reduced sentence under either Justice Sotomayor's or the plurality's approach in *Freeman*, thus making any decision by this Court immaterial to the outcome.[16]

This case stands in stark contrast. Here, Mr. Hughes has not waived his *Freeman* challenge, and

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[15] *See* Brief in Opposition, *Negrón v. United States*, No. 16-999, at **11-13 (U.S. May 19, 2017), *cert. denied*, 2017 WL 636003 (U.S. June 26, 2017); Brief in Opposition, *Gilmore v. United States*, No. 16-7953, at *12-13 (U.S. May 19, 2017), *cert. denied*, 2017 WL 661819 (U.S. June 19, 2017); Brief in Opposition, *Blaine v. United States*, No. 16-6574, at *15 (U.S. Feb. 6, 2017), *cert. denied*, 137 S. Ct. 1329 (2017); Brief in Opposition, *Fuentes v. United States*, No. 16-6132, at **10-12 (U.S. Nov. 23, 2016), *cert. denied*, 137 S. Ct. 627 (2017); Brief in Opposition, *Chapman v. United States*, No. 16-5969, at **12-14 (U.S. Nov. 16, 2016), *cert. denied*, 137 S. Ct. 625 (2017).

[16] *See* Brief in Opposition, *Gilmore v. United States*, No. 16-7953, at **22-23 (U.S. May 19, 2017) *cert. denied*, 2017 WL 661819 (U.S. June 19, 2017); Brief in Opposition, *Sullivan v. United States*, No. 16-7182, at *15 (U.S. May 15, 2017), *cert. denied*, 2017 WL 2621326 (U.S. June 19, 2017); Brief in Opposition, *Blaine v. United States*, No. 16-6574, at **23-24 (U.S. Feb. 6, 2017), *cert. denied*, 137 S. Ct. 1329 (2017); Brief in Opposition, *McNeese v. United States*, No. 16-66, 2016 WL 6082343, at *12 (U.S. Oct. 14, 2016), *cert. denied*, 137 S. Ct. 474 (2016).

his sentence could be lowered within the amended range.

1. In his briefing below, Mr. Hughes expressly challenged the district court's reliance on Justice Sotomayor's concurrence. *See, e.g.*, Initial Brief of Appellant, *United States v. Hughes*, No. 15-15246-C, 2016 WL 1376175, at **10-12 (11th Cir. Mar. 14, 2016). The Eleventh Circuit plainly did not consider the issue waived; to the contrary, its opinion is based entirely on the *Freeman* split. Pet. App. 4a-5a, 9a-10a.

Further, this case squarely raises the question of how to apply *Marks* to determine the Court's holding, both under *Freeman* specifically and more generally under other fragmented Supreme Court decisions. If the D.C. and Ninth Circuits are correct that an opinion must be a "logical subset" of another in order to be considered controlling under *Marks*, then neither the plurality nor the concurrence in *Freeman* is controlling, as neither is a logical subset of the other (*see infra* § IV), and the Eleventh Circuit's analysis was incorrect. If, however, it is enough to share in the "result," then the Eleventh Circuit properly relied on Justice Sotomayor's concurrence as controlling because it was the narrowest opinion supporting the majority result. Thus, identifying the controlling opinion in *Freeman* is not an abstract issue in this case; the outcome of the case turns on it.

2. Likewise, if Mr. Hughes were determined to be eligible for a sentence reduction under § 3582, he is not otherwise categorically barred from relief. Because his current sentence (180 months) is not already below the amended Sentencing Guidelines

range (151 to 188 months), there is room for a reduction. And because his sentence is actually below the lower limit of the original Guidelines range (188 to 235 months), a comparable sentence under the amended Guidelines would suggest that his amended sentence should be at the lower end of the amended range. *See, e.g.*, U.S. Sentencing Guidelines Manual, Commentary § 1B1.10 cmt. note 3 (U.S. Sentencing Comm'n Nov. 2015) (calculating "comparable adjustments"); *id.* ("If the term of imprisonment imposed was outside the guideline range applicable to the defendant ... the court ... *may* reduce the defendant's term of imprisonment, but shall not reduce it to a term less than" the lower threshold of the amended Guideline range) (emphasis added).

Accordingly, if a reduction were permitted, the district court could reduce Mr. Hughes's sentence to a term of imprisonment as low as 151 months. *Compare McNeese*, 137 S. Ct. 474 (where his sentence was already "less than the minimum of the amended guideline range," defendant was ineligible for a sentence reduction). *See generally* Brief in Opposition, *McNeese*, 2016 WL 6082343, at *11; U.S.S.G. § 1B1.10(b)(2)(A) (providing that a district court "shall not reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) to a term that is less than the minimum of the amended guideline range").

This Court has denied several recent certiorari petitions about how to treat C-type agreements. But none of them separately raised the *Marks* question or presented such a clean vehicle. As noted above, the petitioner had plainly waived his *Freeman* challenge

in several of the petitions. *Supra* 26, n.15. And in others, the Court's intervention would have resulted in no relief for the Petitioner. *Supra* 26, n. 16. *See, e.g.*, Brief in Opposition, *Gilmore v. United States*, No. 16-7953, at *23 (U.S. May 19, 2017) (explaining that defendant was ineligible for a sentence reduction because the amended range is "well above the 168-month sentence that petitioner already received"); Brief in Opposition, *Sullivan v. United States*, No. 16-7182, at *15 (U.S. May 15, 2017) (explaining that defendant was ineligible for sentence reduction because the amended range, "at the low end, is 31 months longer than the 204-month term of imprisonment that the district court already imposed").

3. Mr. Hughes also satisfies all six factors that the government has characterized as unique to the "subset" of cases impacted by the *Freeman* circuit split: (1) the district court accepted an agreement that contained a binding sentence, Pet. App. 44a; (2) the agreement did not specifically mention the Guidelines as a basis for the sentence but the district court nonetheless expressly relied on the Guidelines as part of its analytical framework, Pet. App. 32a-33a; (3) the Sentencing Commission subsequently lowered the relevant sentencing range retroactively while Mr. Hughes was still serving his sentence, Pet. App. 3a-4a; *see also* U.S. Sentencing Guidelines Manual § 1B1.10 (U.S. Sentencing Comm'n Nov. 2015); (4) Mr. Hughes made a motion for § 3582(c) relief, Pet. App. 71a-76a; (5) the Commission's binding policy statements do not bar Mr. Hughes from obtaining the relief sought, U.S. Sentencing Guidelines Manual § 1B1.10 (U.S. Sentencing Comm'n Nov. 2015); and (6) there is

no reason to believe the district court would not exercise its discretion to permit relief (taking into account applicable factors set forth in 18 U.S.C. § 3553(a) and the advantages already gained by Mr. Hughes's connection with the agreement, such as dismissal of other charges). *See, e.g.*, Brief in Opposition, *McNeese*, 2016 WL 6082343, at *18. Mr. Hughes also expressly raises the *Marks* question, not just the specific *Freeman* question.

In sum, the *Marks* and *Freeman* issues are well-developed, the splits are clear and deep, and the vehicle is clean. Granting the petition would not only give this Court a much-needed opportunity to address *Marks* by clarifying *Freeman*, but it would also significantly impact Mr. Hughes and many other incarcerated prisoners who are currently ineligible for a sentence reduction in circuits where Justice Sotomayor's separate concurrence wrongly controls.

IV. The Eleventh Circuit Decision Is Wrong And Should Be Reversed.

The Eleventh Circuit's ruling is wrong because it rejects the "logical subset" test—the only workable application of *Marks*, under which an opinion from a fragmented decision controls only to the extent that it reflects the "narrowest grounds" for the judgment. 430 U.S. at 193. Here, as the Ninth Circuit has explained, "Justice Sotomayor focused on the role the *parties'* Guidelines calculations play .... By contrast, the plurality focuses on the role of the *judge's* Guidelines calculations in deciding whether to accept or reject the agreement." *Davis*, 825 F.3d at 1022 (emphasis in original). The plurality and concurring

opinions thus lack a common rationale. The concurrence is not narrower—just different.

Under the "logical subset" test—properly applied by the D.C. and Ninth Circuits—an opinion cannot be the "narrowest grounds" for the Court's decision if there is a factual scenario in which one opinion would grant relief but the other would not, and vice versa. The government's opposition to the D.C. and Ninth Circuits' application of *Marks* to *Freeman* has posited that "no scenario exists under which a defendant could prevail under Justice Sotomayor's approach but the plurality would disagree." *See, e.g.*, Brief in Opposition, *McNeese*, 2016 WL 6082343, at **16-17. But that is incorrect. "Cases producing an outcome in favor of the defendant under Justice Sotomayor's opinion would *not* invariably yield an outcome in his favor under the plurality." *United States v. Duvall*, 740 F.3d 604, 619 (D.C. Cir. 2013) (Williams, J., concurring in denial of rehearing en banc) (emphasis in original).

Imagine a scenario where the parties expressly include the text of a particular Sentencing Guideline in the pertinent provision of the plea agreement, but the district court disagrees with the parties' assessment regarding the applicable sentencing range. *Davis*, 825 F.3d at 1023. If the court nonetheless accepts the plea agreement, the defendant would be eligible for a later sentence reduction under Justice Sotomayor's concurrence because the parties expressly included language from the Guidelines in the relevant terms of the agreement. But the defendant would not be eligible for a reduction under the plurality's approach, because the court disagreed with the articulated Guidelines range and thus based the sentence

on other considerations. *Id.* Indeed, the *Freeman* plurality notes that it is only "likely," not guaranteed, that a sentencing court would base its decision on the Guidelines. 564 U.S. at 534. And there are certainly factual scenarios where a defendant would be eligible for a sentence reduction under the plurality opinion but not the concurrence. Because both scenarios exist, neither Justice Sotomayor's concurrence nor the plurality's opinion can be said to be "narrow[er]" than the other. *Davis*, 825 F.3d at 1023-24.

The "results" test that the Eleventh Circuit and other circuits have employed should be rejected. It cannot be that an opinion rejected by every Justice except its author is nonetheless binding precedent. *See Freeman*, 564 U.S. at 532-33 (plurality op.) (rejecting Justice Sotomayor's reliance on the terms of the plea agreement because the "statute ... calls for an inquiry into the reasons for a judge's sentence, not the reasons that motivated or informed the parties."); *id.* at 544 (Roberts, C.J., dissenting) ("I agree with the plurality that the approach of the concurrence to determining when a Rule 11(c)(1)(C) sentence may be reduced is arbitrary and unworkable."). The Eleventh Circuit, by giving binding effect to Justice Sotomayor's separate concurrence, has "turn[ed] a single opinion that lacks majority support into national law." *King*, 950 F.2d at 782; *see id.* ("When eight of nine Justices do not subscribe to a given approach to a legal question, it surely cannot be proper to endow that approach with controlling force ...."). Eugene Wambaugh, *The Study of Cases* § 48, at 50 & n.1 (2d ed. 1894) ("If ... less than a majority concur in a rule, no one will claim that it has the force of the authority of the court.").

Neither Justice Sotomayor's concurrence nor the plurality's opinion ultimately controls in *Freeman* beyond the basic rule that § 3582(c)(2) relief is available to at least some defendants who have signed plea agreements under Fed. R. Crim. P. 11(c)(1)(C). The Eleventh Circuit erred in holding that it was bound by Justice Sotomayor's concurrence.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 15-15246

D.C. Docket No. 4:13-cr-00043-HLM-WEJ-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ERIK LINDSEY HUGHES,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Georgia

(February 27, 2017)

Before WILLIAM PRYOR, JORDAN, and BALDOCK,* Circuit Judges.

WILLIAM PRYOR, Circuit Judge:

This appeal requires us to apply the rule of *Marks. v. United States*, 430 U.S. 188 (1977), to the splintered opinion in *Freeman v. United States*, 564 U.S. 522 (2011), to determine whether a defendant who entered into a plea agreement that recommended a particular sentence as a condition of his guilty plea is eligible for a reduced sentence, 18 U.S.C. § 3582(c)(2). Erik Hughes pleaded guilty to drug and firearm offenses and entered into a binding plea agreement with the government, Fed. R. Crim. P. 11(c)(1)(C). The district court accepted the agreement and sentenced Hughes according to the agreement. Hughes then sought a sentence reduction permitted for defendants who have been "sentenced to a term of imprisonment *based on a sentencing range* that has subsequently been lowered by the Sentencing Commission." 18 U.S.C. § 3582(c)(2) (emphasis added). In *Freeman*, the justices divided over the question whether a defendant sentenced under a binding plea agreement was sentenced "based on a sentencing range." 564 U.S. at 525, 534. The district court determined that Justice Sotomayor's concurring opinion stated the holding in *Freeman* because she concurred in the judgment on the narrowest grounds, *Marks*, 430 U.S. at 193, and it denied Hughes's motion based on the reasoning of

* Honorable Bobby R. Baldock, United States Circuit Judge for the Tenth Circuit, sitting by designation.

that concurring opinion. We agree on both counts. Hughes is ineligible for a sentence reduction because he was not sentenced "based on a sentencing range," 18 U.S.C. § 3582(c)(2), that has since been lowered. We affirm.

I. BACKGROUND

In 2013, a federal grand jury returned an indictment that charged Erik Hughes in four counts for drug and firearm offenses. Hughes pleaded guilty to two counts: conspiracy to possess with intent to distribute at least 500 grams of methamphetamine, 21 U.S.C. §§ 841(b)(1)(A)(viii), 846, and being a felon in possession of a firearm, 18 U.S.C. § 922(g)(1). In the plea agreement, Hughes and the government agreed to a sentence of 180 months of imprisonment.

At the sentencing hearing, the district court calculated Hughes's guidelines range and determined that his sentencing range under the United States Sentencing Guidelines was 188 to 235 months. The district court then accepted the plea agreement, which bound the court to impose the below-guidelines sentence recommended by the parties. *See* Fed. R. Crim. P. 11(c)(1)(C). So the district court sentenced Hughes to 180 months of imprisonment.

Just over a year later, Hughes filed a motion to reduce his sentence, 18 U.S.C. § 3582(c)(2). Section 3582(c)(2) allows a court to reduce the term of imprisonment of "a defendant who has been sentenced ... based on a sentencing range that has subsequently been lowered by the Sentencing Commission." Hughes sought a reduction based on

Amendment 782 to the Sentencing Guidelines, which reduced the offense levels for certain drug offenses by two levels and applies retroactively. *See* United States Sentencing Guidelines Manual § 1B1.10 (Nov. 2015). According to Hughes, applying the amendment would reduce his guidelines range to 151 to 188 months.

The district court denied Hughes's motion. It determined that Hughes was ineligible for a reduced sentence. It reasoned, based on Justice Sotomayor's concurring opinion in *Freeman*, that the sentence in Hughes's binding plea agreement was not "based on" a sentencing guidelines range as required by section 3582(c)(2).

II. STANDARDS OF REVIEW

"We review a district court's decision whether to reduce a sentence pursuant to [section] 3582(c)(2), based on a subsequent change in the sentencing guidelines, for abuse of discretion." *United States v. Brown*, 332 F.3d 1341, 1343 (11th Cir. 2003). Like all questions of statutory interpretation, we review the conclusions of the district court about the scope of its legal authority under section 3582(c)(2) *de novo*. *United States v. Moore*, 541 F.3d 1323, 1326 (11th Cir. 2008).

III. DISCUSSION

We divide our discussion in two parts. First, we explain that Justice Sotomayor's concurring opinion in *Freeman* constitutes the holding of that decision because it is the "position taken by th[e] [Justice] who

concurred in the judgment[] on the narrowest grounds." *Marks*, 430 U.S. at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)). Second, we explain that the district court correctly denied Hughes's motion for a sentence reduction because applying the holding of *Freeman*, Hughes was not sentenced based on a sentencing guidelines range, *Freeman*, 564 U.S. at 538-39 (Sotomayor, J., concurring in the judgment).

A. Justice Sotomayor's Concurring Opinion Stated the Holding in Freeman.

Federal courts ordinarily may not "modify a term of imprisonment once it has been imposed," 18 U.S.C. § 3582(c), but "Congress has provided an exception to that rule 'in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission.'" *Dillon v. United States*, 560 U.S. 817,819 (2010) (quoting 18 U.S.C. § 3582(c)(2)). Such a defendant may have his sentence reduced after the court "consider[s] the factors set forth in [18 U.S.C.] § 3553(a) ... if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." *Id.* § 3582(c)(2).

In *Freeman*, the Supreme Court split over the question whether defendants like Hughes who enter into plea agreements that recommend a particular sentence as a condition of their guilty plea were sentenced "based on a sentencing range." 564 U.S. at 525 (plurality opinion). William Freeman entered into

a plea agreement with the government under Rule 11(c)(1)(C), and the district court accepted the agreement and imposed the recommended sentence. *Id.* at 527-28. The Sentencing Commission later issued a retroactive amendment that lowered the guidelines range applicable to Freeman's conduct, and he moved for a sentence reduction, 18 U.S.C. § 3582(c)(2). *Id.* at 528. The district court denied Freeman's motion, and the Sixth Circuit affirmed. *Id.* But the Supreme Court, in a five to four decision, reversed. *Id.* at 525-526

Five justices agreed that the district court could reduce Freeman's sentence, but those justices differed in their reasoning. The plurality opinion, joined by four justices, determined that the "[t]he district judge's decision to impose a sentence may ... be based on the Guidelines even if the defendant agrees to plead guilty under Rule 11(c)(1)(C)." *Id.* at 526. "In every case the judge must exercise discretion to impose an appropriate sentence" and "[t]his discretion, in turn, is framed by the Guidelines." *Id.* at 525. But Justice Sotomayor concurred only in the judgment. *Id.* at 534.

Justice Sotomayor's concurring opinion determined that "the term of imprisonment imposed by a district court pursuant to an agreement authorized by Federal Rule of Criminal Procedure 1(c)(1)(C) ... is 'based on' the agreement itself, not on the judge's calculation of the Sentencing Guidelines." *Id.* (Sotomayor, J., concurring in the judgment). Under this view, if a plea agreement "call[s] for the defendant to be sentenced within a particular Guidelines sentencing range," the acceptance of the

agreement by the district court "obligates the court to sentence the defendant accordingly, and there can be no doubt that the term of imprisonment the court imposes is 'based on' the agreed-upon sentencing range." *Id.* at 538. And if a plea agreement "provide[s] for a specific term of imprisonment ... but also make[s] clear that the basis for the specified term is a Guidelines sentencing range applicable to the offense to which the defendant pleaded guilty," then "[a]s long as that sentencing range is evident from the agreement itself," the term of imprisonment imposed is "based on" that range. *Id.* at 539.

"When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Marks*, 430 U.S. at 193 (quoting *Gregg*, 428 U.S. at 169 n.15). "The *Marks* Court did not elaborate on how to identify the narrowest grounds." Bryan A. Garner, *et al.*, *The Law of Judicial Precedent* 199-200 (2016). "But the prevailing view is that the narrowest grounds are those that, when applied to other cases, would consistently produce results that a majority of the Justices supporting the result in the governing precedent would have reached." *Id.* at 200. We have explained that the "'narrowest grounds' is understood as the 'less far-reaching' common ground." *United States v. Robison*, 505 F.3d 1208, 1221 (11th Cir. 2007) (quoting *Johnson v. Bd. of Regents*, 263 F.3d 1234, 1247 (11th Cir. 2001)). When determining which opinion controls, we do not "consider the positions of those who dissented." *Id.*

Justice Sotomayor's opinion in *Freeman* provides the narrowest ground of agreement because her concurring opinion establishes the "le[ast] far-reaching" rule. District courts are required to consult the guidelines before sentencing a defendant, *see Freeman*, 564 U.S. at 525-26 (plurality opinion), and district courts may not accept an agreement under Rule 11(c)(1)(C) "without first evaluating the recommended sentence in [the] light of the defendant's applicable sentencing range." *Id.* at 529; *see also* U.S.S.G. § 6B1.2. Under the logic of the plurality opinion, the guidelines range always "provide[s] a framework or starting point—a basis, in the commonsense meaning of the term—for the judge's exercise of discretion" in deciding to accept a plea agreement under Rule 11(c)(1)(C). *Id.* Justice Sotomayor's opinion, by contrast, provides two examples in which a sentence is based on a sentencing range.

Both opinions agree on the broader principle that defendants sentenced based on a binding plea agreement can later have their sentences reduced under section 3582(c)(2), but the concurring opinion uses narrower reasoning than the plurality opinion. Whenever the concurring opinion would grant relief to a defendant sentenced according to a binding plea agreement, the plurality opinion would agree with the result because, under the logic of the plurality opinion, a defendant should always receive relief. Justice Sotomayor's opinion is the less far-reaching common ground. We already reached this conclusion *in dicta* when we evaluated the impact of *Freeman* on our precedent and stated that "Justice Sotomayor's concurring opinion can be viewed as the holding in

Freeman." *United States v. Lawson*, 686 F.3d 1317, 1321 n.2 (11th Cir. 2012).

The decisions of eight sister circuits also support our conclusion that Justice Sotomayor's concurring opinion is the holding of *Freeman*. *See Garner, et al., supra*, at 204 ("Almost every federal circuit court to consider the *Marks* issue in *Freeman* has held that [Justice Sotomayor's] opinion is controlling."). The First, Third, and Fourth Circuits reached that conclusion because "the plurality would surely agree that in every case in which a defendant's [Rule 11(c)(1)(C)] plea agreement satisfies the criteria for Justice Sotomayor's exception ... the sentencing judge's decision to accept that sentence is based on the guidelines." *United States v. Rivera-Martínez*, 665 F.3d 344, 348 (1st Cir. 2011); *see also United States v. Thompson*, 682 F.3d 285, 289 (3d Cir. 2012); *United States v. Brown*, 653 F.3d 337, 340 n.1 (4th Cir. 2011). The Tenth Circuit explained that Justice Sotomayor's concurring opinion is the holding in *Freeman* because it is a "middle ground." *United States v. Graham*, 704 F.3d 1275, 1277-78 (10th Cir. 2013). And the Fifth, Sixth, Seventh, Eighth Circuits adopted Justice Sotomayor's concurring opinion after stating the *Marks* rule and then stating that Justice Sotomayor's concurring opinion provides the narrowest ground of agreement. *See United States v. Benitez*, 822 F.3d 807, 811 (5th Cir. 2016); *United States v. Smith*, 658 F.3d 608, 611 (6th Cir. 2011); *United States v. Dixon*, 687 F.3d 356, 359 (7th Cir. 2012); *United States v. Browne*, 698 F.3d 1042, 1045 (8th Cir. 2012).

The decisions of two circuits deviate from this majority view and hold that Justice Sotomayor's

concurring opinion does not provide the narrowest ground of agreement in *Freeman*, but we find their reasoning unpersuasive. The Ninth and D.C. Circuits explained that the rule in *Marks* applies when one opinion is a "logical subset" of another, broader opinion. *See United States v. Davis*, 825 F.3d 1014, 1021-22 (9th Cir. 2016) (*en banc*); *United States v. Epps*, 707 F.3d 337, 350 (D.C. Cir. 2013). Both courts then determined that Justice Sotomayor's concurring opinion is not a logical subset of the plurality opinion but instead offers a different rationale because the concurring opinion focuses on the parties' agreement and the plurality opinion focuses on "the role of the judge's Guidelines calculations in deciding whether to accept or reject the agreement." *Davis*, 825 F.3d at 1022; *see also Epps*, 707 F.3d at 350. But this narrow focus on the rationale of the opinions in *Freeman* is misplaced.

The Supreme Court has not stated that an opinion can qualify as the "narrowest grounds" of decision only when it "represent[s] a common denominator of the Court's reasoning." *Davis*, 825 F.3d at 1020 (quoting *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (*en banc*)); *see also id.* at 1031 (Bea, J., dissenting) ("The ... 'logical subset' requirement is an invention of the D.C. Circuit that finds no support in *Marks* or any other Supreme Court precedent."). Indeed, the Supreme Court has determined that an opinion is controlling, under *Marks*, even when that opinion does not share common reasoning with the other opinions necessary to support the judgment. *See O'Dell v. Netherland*, 521 U.S. 151, 162 (1997) (adopting Justice White's concurring opinion in *Gardner v. Florida*, 430 U.S 349

(1977), as the "narrowest grounds of decision among the justices whose votes were necessary to the judgment" even though the concurring opinion relied on a different constitutional amendment than the plurality opinion). "After all, in splintered cases, there are multiple opinions precisely because the Justices did not agree on a common rationale." *United States v. Duvall*, 740 F.3d 604, 613 (D.C. Cir. 2013) (Kavanaugh, J., concurring in the denial of rehearing en banc).

Marks itself determined that a plurality opinion governed as the narrowest grounds of decision notwithstanding that none of the justices that concurred in the judgment "*agreed* with the rule enumerated by the ... plurality." *Davis*, 825 F.3d at 1034 (Bea, J., dissenting). *Marks* evaluated which opinion provided the holding of the Supreme Court in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of the Commonwealth of Massachusetts*, 383 U.S. 413 (1966). The plurality opinion in *Memoirs* determined that literature was protected by the First Amendment unless it satisfied the test of obscenity established by *Roth v. United States*, 354 U.S. 476 (1957). *See Memoirs*, 383 U.S. at 418. Justice Black's and Justice Douglas's concurring opinions in *Memoirs*, in contrast, stated a rule that "the First Amendment provides an absolute shield against governmental action aimed at suppressing obscenity." *Marks*, 430 U.S. at 193. And Justice Stewart's concurring opinion, different still, explained that only hardcore pornography could be suppressed. *Id.* Although six justices agreed that the literature at issue was protected by the First Amendment, only the plurality opinion, joined by

three justices, relied on the test in *Roth* to reach that result. Yet the Supreme Court determined that the plurality opinion governed as the "position taken by those Members who concurred in the judgments on the narrowest grounds," *Id.* (quoting *Gregg*, 428 U.S. at 169 n.15).

The decision in *Marks* that the plurality opinion in *Memoirs* stated the holding makes clear that when no opinion garners a majority of the votes, the opinion that relies on the narrowest grounds necessary to reach the judgment controls. *See also United States v. Santos*, 553 U.S. 507, 523 (2008) (opinion of Scalia, Souter, and Ginsburg, JJ.) (explaining that the holding of the Court was limited by Justice Stevens's concurrence because his vote was necessary to the judgment and his opinion rested upon the narrower ground). As Judge Bea has explained, "*Marks*' emphasis on the Court's 'judgment' demonstrates that it is the ultimate 'vote' of five Justices that is important in determining the binding effect of a splintered Supreme Court opinion." *Davis*, 825 F.3d at 1035 (Bea, J., dissenting). "That is, *Marks* requires us to find a 'legal standard which, when applied, will necessarily produce *results* with which a majority of the Court from that case would agree." *Id.* (quoting *United States v. Williams*, 435 F.3d 1148, 1157 n.9 (9th Cir. 2006)); *see also Duvall*, 740 F.3d at 608 (Kavanaugh, J., concurring in the denial of rehearing *en banc*).

As we see it, Justice Sotomayor's opinion provides a legal standard that produces results with which a majority of the Court in *Freeman* would agree because whenever Justice Sotomayor's opinion would

permit a sentence reduction, the plurality opinion would as well. The plurality opinion stated that because a judge must "evaluat[e] the recommended sentence in [the] light of the defendant's applicable sentencing range" and determine "either that such sentence is an appropriate sentence within the applicable guideline range or, if not, that the sentence departs from the applicable guideline range for justifiable reasons" before the judge accepts the agreement, "the court's acceptance is itself based on the Guidelines." *Freeman*, 564 U.S. at 529 (plurality opinion) (internal quotation marks omitted). Justice Sotomayor's opinion, in contrast, provided two examples in which a sentence imposed according to a plea agreement is "based on a sentencing range." Because the district judge must evaluate the sentencing range before accepting the plea agreement, the plurality opinion would reach the same result as Justice Sotomayor's concurring opinion and determine that, in those two circumstances, the defendant was sentenced "based on a sentencing range" and qualifies for a sentence reduction. As a result, Justice Sotomayor's opinion is the narrower opinion.

When applying the rule of *Marks* to a splintered Supreme Court opinion, we must determine which opinion that supports the judgment relied on the narrowest grounds. Applying this rule to *Freeman*, it is clear that Justice Sotomayor's opinion controls because "'sometimes' is a middle ground between 'always' and 'never.'" Duvall, 740 F.3d at 612 (Kavanaugh, J., concurring in the denial of rehearing en banc). As a result, we must apply Justice Sotomayor's concurring opinion to determine whether

Hughes qualifies for a sentence reduction under section 3582(c)(2).

B. Hughes Is Not Eligible for a Sentence Reduction.

The district court did not abuse its discretion when it determined that Hughes is not eligible for a sentence reduction because Hughes's sentence was not based on a sentencing guidelines range. Justice Sotomayor's opinion explained that a trial judge's acceptance of a binding plea agreement is "based on" a sentencing range when the Rule 11(c)(1)(C) agreement calls for a "defendant to be sentenced within a particular Guidelines sentencing range," or the agreement "make[s] clear that the basis for the specified term is a Guidelines sentencing range applicable to the offense to which the defendant pleaded guilty." *Freeman*, 564 U.S. at 538-39 (Sotomayor, J., concurring in the judgment). Hughes's agreement does neither. His plea agreement does not call for him to be sentenced within a particular sentencing range but instead states that he "should be sentenced to 180 months." And his plea agreement does not "make clear" that the basis for the 180 month recommendation is a guidelines sentencing range.

The plea agreement does not "make clear" that a sentencing range formed the basis for Hughes's sentence. The agreement states that the district court and the probation office will calculate the applicable guidelines range. And the government reserved the right to modify its recommendations about the guidelines. But the agreement does not make any recommendation about a specific application of the Sentencing Guidelines, and the agreement does not

calculate Hughes's range or discuss factors that must be used to determine that range, such as Hughes's criminal history. Nor does it set the agreed-upon sentence within the applicable guideline range. Hughes was not sentenced "based on" a guidelines range, and he is not eligible for a sentence modification under section 3582.

IV. CONCLUSION

We **AFFIRM** the judgment of the district court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

UNITED STATES OF AMERICA,

v. CRIMINAL ACTION FILE NO.
4:13-CR-043-01-HLM-WEJ

ERIK HUGHES.

ORDER

This case is before the Court on Defendant's Motion to Reduce Sentence—U.S.S.C. Amendment ("Motion to Reduce Sentence") [87].

I. Background

On August 5, 2013, a federal grand jury sitting in the Northern District of Georgia returned an indictment against Defendant and two co-defendants. (Docket Entry No. 6.) Count one of the indictment charged Defendant and his co-defendants with conspiring to possess with intent to distribute at least 500 grams of a mixture and substance containing a detectable amount of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A)(viii), and 846. (*Id.* at 1.) Count two of the indictment charged that, on or about March 24, 2009, Defendant and a co-defendant possessed with intent to distribute at least 50 grams of methamphetamine, in violation of 21 U.S.C §§ 841(a)(1) and 841(b)(1)(B)(viii) and 18 U.S.C. § 2. (*Id.* at 1-2.) Count three of the

indictment charged Defendant with being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). (*Id.* at 2.) Count four of the indictment charged Defendant with knowingly possessing a firearm that had the manufacturer's serial number obliterated, in violation of 18 U.S.C. § 922(k). (*Id.* at 3.) The indictment also contained a forfeiture provision. (*Id.* at 4-5.)

On December 19, 2013, Defendant pleaded guilty to counts one and three of the indictment under a binding plea agreement. (Docket Entry No. 54.) On March 3, 2014, the Court sentenced Defendant to 180 months of imprisonment on count one, as provided in the binding plea agreement, to be followed by five years of supervised release, and to 120 months on count three, to run concurrently with the sentence imposed on count one and to be followed by three years of supervised release. (Docket Entry No. 68.) On March 4, 2014, the Court entered its Judgment and Commitment Order. (Docket Entry No. 69.)

On June 15, 2015, the Court received Defendant's Motion to Reduce Sentence. (Docket Entry No. 87.) Defendant argues that a recent amendment to the Sentencing Guidelines, Amendment 782, warrants a reduction in Defendant's base offense level and his sentence. (*See generally id.*)

The Government has responded to the Motion to Reduce Sentence, arguing that the Court may not use Amendment 782 to decrease Defendant's term of imprisonment. (*See generally* Resp. Mot. Reduce Sentence (Docket Entry No. 94).) The time period in which Defendant could file a reply in support of his

Motion to Reduce Sentence has expired, and the Court therefore finds that the Motion is ripe for resolution.

II. Discussion

The Court agrees with the Government that Defendant is not entitled to a sentence reduction under Amendment 782. Federal Rule of Criminal Procedure 11(c)(1) provides, in relevant part:

> An attorney for the government and the defendant's attorney, or the defendant when proceeding *pro se*, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:
>
> ...
>
> (C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

Fed. R. Crim. P. 11(c)(1).

In *Freeman v. United States*, 131 S. Ct. 2685 (2011), the Supreme Court considered "whether defendants who enter into plea agreements that recommend a particular sentence as a condition of the guilty plea may be eligible for relief under § 3582(c)(2)." 131 S. Ct. at 2689. The United States Court of Appeals for the Sixth Circuit "held that, barring a miscarriage of justice or mutual mistake, defendants who enter into 11(c)(1)(C) agreements cannot benefit from retroactive Guideline amendments." *Id.* Five members of the Supreme Court agreed that the Sixth Circuit's judgment was due to be reversed. *Id.* Four justices noted that:

> The district court's decision to impose a sentence may ... be based on the Guidelines even if the defendant agrees to plead guilty under Rule 11(c)(1)(C). Where the decision to impose a sentence is. based on a range later subject to retroactive amendment, § 3582(c)(2) permits a sentence reduction.

Id. Those justices concluded:

> Even when a defendant enters into an 11(c)(1)(C) agreement, the judge's decision to accept the plea and impose the recommended sentence is likely to be based on the Guidelines; and when it is, the defendant should be eligible to seek § 3582(c)(2) relief. This

> straightforward analysis would avoid making arbitrary distinctions between similar defendants based on the terms of their plea agreements. And it would also reduce unwarranted disparities in federal sentencing, consistent with the purposes of the Sentence Reform Act.

Id. at 2695.

Justice Sotomayor, in a concurring opinion, agreed that Freeman was eligible for a sentence reduction, but for a different reason. *Freeman*, 131 S. Ct. at 2695. Justice Sotomayor noted:

> In my view, the term of imprisonment imposed by a district court pursuant to an agreement authorized by Federal Rule of Criminal Procedure 11(c)(1)(C)((C) agreement) is "based on" the agreement itself, not on the judge's calculation of the Sentencing Guidelines. However, I believe that if a(C) agreement expressly uses a Guidelines sentencing range applicable to the charged offense to establish the term of imprisonment, and that range is subsequently lowered by the United States Sentencing Commission, the term of imprisonment is "based on" the range employed and the defendant is eligible for sentence reduction under § 3582(c)(2).

Id. Justice Sotomayor observed that, in the context of an agreement under Rule 11(c)(1)(C), "[t]he term of imprisonment imposed by the sentencing judge is dictated by the terms of the agreement entered into by the parties, not the judge's Guidelines calculation." *Id.* at 2696. Thus, in her view, "the term of imprisonment imposed pursuant to a (C) agreement is, for purposes of § 3582(c)(2), 'based on' the agreement itself." *Id.* Justice Sotomoyor observed:

> To hold otherwise would be to contravene the very purpose of (C) agreements—to bind the district court and allow the Government and the defendant to determine what sentence he will receive. Although district courts ordinarily have significant discretion in determining the appropriate sentence to be imposed on a particular defendant, under Rule 11(c)(1)(C) it is the parties' agreement that determines the sentence to be imposed. To be sure, the court retains absolute discretion whether to accept a plea agreement, but once it does it is bound at sentencing to give effect to the parties' agreement as to the appropriate term of imprisonment.
>
> Allowing district courts later to reduce a term of imprisonment simply because the court itself considered the Guidelines in deciding whether to accept the agreement would transform § 3582(c)(2) into a mechanism by which

> courts could rewrite the terms of (C) agreements in ways not contemplated by the parties. At the time that § 3582(c)(2) was enacted in 1984, it was already well understood that, under Rule 11, the term of imprisonment stipulated in a (C) agreement bound the district court once it accepted the agreement.

Id. (internal quotation marks, citations, and footnote omitted).

Justice Sotomayor, however, noted that a term of imprisonment imposed under a Rule 11(c)(1)(C) agreement still could be reduced under § 3582(c)(2) under certain circumstances. *Freeman*, 131 S. Ct. at 2697-98. She observed:

> For example, Rule 11(c)(1)(C) allows the parties to agree that a specific ... sentencing range is the appropriate disposition of the case. In delineating the agreed-upon term of imprisonment, some (C) agreements may call for the defendant to be sentenced within a particular Guidelines sentencing range. In such cases, the district court's acceptance of the agreement obligates the court to sentence the defendant accordingly, and there can be no doubt that the term of imprisonment the court imposes is "based on" the agreed-upon sentencing range within the meaning of § 3582(c)(2). If that

> Guidelines range is subsequently lowered by the Sentencing Commission, the defendant is eligible for sentence reduction.
>
> Similarly, a plea agreement might provide for a specific term of imprisonment—such as a number of months—but also make clear that the basis for the specified term is a Guidelines sentencing range applicable to the offense to which the defendant pleaded guilty. As long as that sentencing range is evident from the agreement itself, for purposes of § 3582(c)(2) the term of imprisonment imposed by the court in accordance with that agreement is "based on" that range. Therefore, when a (C) agreement expressly uses a Guidelines sentencing range to establish the term of imprisonment, and that range is subsequently lowered by the Commission, the defendant is eligible for sentence reduction under § 3582(c)(2).

Id. (alteration in original) (footnote omitted).

Most of the appellate courts that have considered this issue have concluded that Justice Sotomayor's standard is the applicable one. *See United States v. Graham*, 704 F.3d 1275, 1278 (10th Cir. 2013) ("Every federal appellate court to consider the matter has reached the same conclusion, and we

agree: Justice Sotomayor's concurrence is the narrowest grounds of decision and represents the Court's holding."); *United States v. Browne*, 698 F.3d 1042, 1045 (8th Cir. 2012) ("It is Justice Sotomayor's concurring opinion in *Freeman* that is controlling and represents the holding of the Court."); *United States v. Dixon*, 687 F.3d 356, 359 (7th Cir. 2012) ("Even though eight Justices disagreed with Justice Sotomayor's approach and believed it would produce arbitrary and unworkable results, her reasoning provided the narrowest, most case-specific basis for deciding *Freeman*. Her approach therefore states the controlling law." (citations omitted)); *United States v. Thompson*, 682 F.3d 285, 290 (3d Cir. 2012) ("[B]ecause Justice Sotomayor's opinion is narrower than Justice Kennedy's, it expresses the holding of the Court."); *United States v. Austin*, 676 F.3d 924, 927 (9th Cir. 2012) ("Justice Sotomayor's concurrence is the controlling opinion because it reached this conclusion on the narrowest grounds." (internal quotation marks and citation omitted)); *United States v. Rivera-Martinez*, 665 F.3d 344, 348 (1st Cir. 2011) ("Justice Sotomayor's concurrence delineates the narrowest grounds on which at least five Justices agree. It is, therefore, the controlling opinion."); *United States v. Brown*, 653 F.3d 337, 340 (4th Cir. 2011) ("Under the fragmented opinion, Justice Sotomayor's rationale becomes the Court's holding." (footnote omitted)); *but see United States v. Epps*, 707 F.3d 337, 350 (D.C. Cir. 2013) ("[W]e conclude that there is no controlling opinion in *Freeman* because the plurality and concurring opinions do not share common reasoning whereby one analysis is a logical subset of the other." (internal quotation marks and

citation omitted)). In an unpublished opinion, the United States Court of Appeals for the Eleventh Circuit noted that "Justice Sotomayor's concurrence 'can be viewed as the holding in *Freeman*.'" *United States v. Hudson*, 550 F. App'x 793, 795 (11th Cir. 2013) (*per curiam*) (quoting *United States v. Lawson*, 686 F.3d 1317, 1321 n.2 (11th Cir. 2012)). The Court follows the majority's approach, and concludes that Justice Sotomayor's concurrence is the holding in *Freeman*.

The United States Court of Appeals for the First Circuit has observed that "Justice Sotomayor allows for eligibility [for reduction under § 3582(c)(2)] when the agreement itself expressly indicates that the term of imprisonment is based on a guideline sentencing range that has subsequently been reduced by the Sentencing Commission." *Rivera-Martinez*, 665 F.3d at 348. According to the First Circuit, this event will occur in "two scenarios." *Id.* Under the first scenario, "a C-type plea agreement calls for a sentence within an identified sentencing range." *Id.* Under the second scenario, the terms contained within the four corners of the plea agreement will warrant a finding that the basis for a specified term of imprisonment is a Guidelines sentencing range. *Id.* at 34849;[1] *see also*

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[1]In *Rivera-Martinez*, the defendant argued that he was entitled to relief under the second scenario. 665 F.3d at 349. The defendant noted "that the Agreement mentions some guideline components (including a total offense level) as well as a specified drug quantity," and contended that those references "ma[d]e it hard to believe that the guidelines did not figure into the agreed sentence." *Id.* The First Circuit rejected that argument, noting:

The defendant's reasoning is plausible, but he is answering the wrong question. Justice Sotomayor's concurrence expressly rejects an inferential approach. She acknowledges that a term of imprisonment in a C-type plea agreement will most often be negotiated by reference to the relevant guideline provisions. Yet under the rationale 'of the concurrence, this linkage is not enough to warrant a finding that the ensuing sentence is based on the guidelines. Justice Sotomayor makes it pellucid that the proper focus is neither the guideline calculations that the judge may perform before deciding whether to accept the agreement, nor the mere fact that the parties ... may have considered the Guidelines in the course of their negotiations. Rather, it is the terms contained within the four corners of the plea agreement that matter.

Silhouetted against this backdrop, the concern that we voiced [in an earlier decision in the case] echoes still. The Agreement does not identify any guideline sentencing range. Moreover, the Agreement does not contain any information about the defendant's criminal history category. This silence about a criminal history category makes it impossible to conclude from the Agreement alone that the proposed sentence is based on a specific sentencing range. The integers needed to trigger the exception carved out by Justice Sotomayor are not present here.

A comparison of the Agreement with the plea agreement in *Freeman* is telling. The latter agreement contained an explicit stipulation to *both* an offense level and a criminal history category. When Justice Sotomayor turned to the sentencing table with these coordinates in

United States v. Scott, 711 F.3d 784, 787 (7th Cir. 2013) ("A defendant who agrees to a specific sentence in a plea agreement under Rule 11(c)(1)(C) generally is not eligible to receive a reduced sentence under § 3582(c)(2) because that statute does not grant relief for sentences based not on a guidelines range, but on an agreed term. The only exceptions occur when the plea agreement specifies that the sentence must be within an identified guidelines range or states that the basis for an agreed term is a particular sentencing range." (citations omitted)).

Applying Justice Sotomayor's concurrence, Defendant is not entitled to relief under § 3582(c)(2) because his original sentence was not tied to the Sentencing Guidelines calculations. Under the plea

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> hand, she could identify with certainty a particular sentencing range. In this case, the Agreement does not permit such certitude. As we have explained, one of the two essential coordinates is missing.
>
> The short of it is that we cannot identify a referenced sentencing range from the Agreement alone. We would have to supplement the Agreement with either the parties' background negotiations or the facts that informed the sentencing judge's decision to accept the plea. Justice Sotomayor's concurrence forbids us from making such an archeological dig. We therefore conclude that the defendant is not eligible for a sentencing reduction under section 3582(c)(2).

Id. at 349-50 (emphasis and first alteration in original) (internal quotation marks, citations, and footnotes omitted).

agreement, the Government and Defendant agreed that "Defendant and the Government expressly recommend that the Court should impose a sentence of 180 months of imprisonment as the appropriate custodial sentence in this case." (Plea Agreement (Docket Entry No. 54) at 4-5.) The plea agreement further provided: "Under the provisions of Fed. R. Cr. P. 11(c)(1)(C), this recommendation would bind the Court to impose this particular custodial sentence if the Court accepts this plea agreement." (*Id.* at 5.) The plea agreement also stated: It is abundantly clear that Defendant's sentence was not linked or tied to the Sentencing Guidelines. Indeed, the plea agreement does not mention an otherwise applicable Sentencing Guidelines range or Defendant's criminal history, and Defendant's criminal history category is not evident from the Agreement itself. Under those circumstances, the Court cannot determine that Defendant's plea agreement identified a Sentencing Guidelines range. *See Scott*, 711 F.3d at 787 (concluding that the defendant was not entitled to a reduction under § 3582(c)(2) where the defendant's Rule 11(c)(1)(C) "plea agreement did not identify a guidelines range or suggest that the agreed-upon sentence was based on the guidelines"); *United States v. Weatherspoon*, 696 F.3d 416, 424 (3d Cir. 2012) ("Because his agreement does not explicitly state his Guidelines range, or his offense level and criminal history category, and because Weatherspoon cannot otherwise demonstrate that his criminal history category is evident from the agreement itself, we cannot conclude that the agreement identifies a Guidelines range. Thus, his claim falls under *Freeman* and his motion was properly denied."

(internal quotation marks and citation omitted);[2] *United States v. Austin*, 676 F.3d 924, 930 (9th Cir. 2012) (concluding that the defendant was not entitled to a reduction under § 3582(c)(2) where his Rule 11(c)(1)(C) plea agreement "simply provide[d] for a specific term of seventeen years," "[n]o sentencing range appear[ed] on the face of the plea agreement that could have formed the basis for the specific term

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[2]In *Weatherspoon*, the United States Court of Appeals for the Third Circuit noted:

> In this case, the parties agreed in the (C) plea agreement that Weatherspoon should receive a fixed sentence of 120 months' imprisonment. Thus, Weatherspoon falls into Justice Sotomayor's second category—where the defendant's agreement calls for a specific term of imprisonment. Confining our analysis solely to the four corners of the plea agreement, we conclude that the agreement does not "make clear" that the foundation of his sentence was the Guidelines, because the agreement does not in any way identify or rely on Weatherspoon's Guidelines range. In fact, the agreement is silent as to his range. Nowhere in the agreement does it explicitly state the range the parties relied upon in determining his sentence. Nor does the agreement provide the necessary ingredients to calculate it. The Guidelines range can only be derived from a determination of a defendant's criminal history category and his offense level. Here, we are missing at least one-half of the equation. There are simply no statements or assertions of fact in the agreement that allow us to determine Weatherspoon's criminal history category.

696 F.3d at 424.

of seventeen years," and "[t]he terms of the agreement [did] not make clear[] that any particular Guidelines range was employed" (internal quotation marks and citation omitted)); *Brown*, 653 F.3d at 340 (finding Rule 11(c)(1)(C) plea agreement "does not expressly use a Guidelines sentencing range to establish his term of imprisonment" where the "plea agreement simply states that the appropriate sentence in this case is incarceration for not less than 180 months and not more than 240 months" (internal quotation marks, citation, and footnote omitted)). Defendant therefore is not entitled to relief under § 3582(c)(2) based on Amendment 782.

III. Conclusion

ACCORDINGLY, the Court **DENIES** Defendant's Motion to Reduce Sentence [87].

IT IS SO ORDERED, this the 6th day of November, 2015.

/s/ Harold L. Murphy
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

UNITED STATES OF AMERICA	)	DOCKET NUMBER 4:13-CR-43-HLM
	)	
	)	
V.	)	
	)	ROME, GEORGIA
	)	MARCH 3, 2014
ERIK LINDSEY HUGHES	)	
	)	
	)	

TRANSCRIPT OF SENTENCING HEARING
BEFORE THE
HONORABLE HAROLD L. MURPHY
UNITED STATES DISTRICT JUDGE

APPEARANCES OF COUNSEL:

FOR THE GOVERNMENT: MS. ANGELA GARLAND

FOR THE DEFENDANT: MR. BRIAN MENDELSOHN

OFFICIAL COURT REPORTER: ALICIA B. BAGLEY, RMR, CRR

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY, TRANSCRIPT PRODUCED BY COMPUTER

P R O C E E D I N G S

[In Rome, Floyd County, Georgia; March 3, 2014; in open court; defendant present.]

THE CLERK: Please come to order and be seated. I'll sound the case of United States of America vs. Erik Hughes.

MS. GARLAND: Good afternoon, Your Honor. I'm Angela Garland. I represent the United States.

THE COURT: Good afternoon.

MR. MENDELSOHN: Good afternoon, Judge. Brian Mendelsohn on behalf of Mr. Hughes.

THE COURT: Good afternoon.

Mr. Hughes, have you read this presentence report and been over it with your lawyer?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand it fairly well?

THE DEFENDANT: Yes, sir.

THE COURT: The Court has reviewed the plea agreement in this case and notes that it is a binding plea agreement. I've considered the allegations of the presentence report, all undisputed. I've considered

the plea agreement, the sentencing guidelines, particularly the provisions of Title 18 of the United States Code, Section 3553(a), and the Court will accept and approve the binding plea agreement.

Having considered all of these items that I've spoken with you about and commented about, the Court finds that it will result in a reasonable sentence that's in the best interest of the Government, the best interest of society, and the best interest of the defendant. It complies not only with the spirit of the advisory United States Sentencing Guidelines, but it complies with the principles of fairness and justness and specific provisions of Section 3553(a) and is a reasonable sentence without any unreasonable disparity between the sentence imposed in this case, pursuant to the binding plea agreement, and sentences imposed upon other defendants with similar backgrounds and similar offenses.

The Court, as I've said, has reviewed the plea agreement itself; I've reviewed the indictment; the comments and objections to the presentence report; the addendum to the presentence report; the findings of facts and conclusions contained in the presentence report, and the Court adopts all of the findings of fact and conclusions contained in the presentence report as prepared by the United States Probation Officer and makes all of those findings of fact and conclusions those of the Court in all respects except as to unresolved guideline issues that I'll speak to in a moment.

The amount of drugs for which the defendant is responsible in this case are set out in Paragraph 31

and the drugs for which he's responsible results in a total Offense Level of 34. The probation officer initially added 2 points pursuant to Section 32 and noted an objection.

Does the Government disagree with the objection that Mr. Mendelsohn has to that 2 points?

MS. GARLAND: The role in the offense, Your Honor; is that correct?

THE COURT: It's possession of a gun in connection with a drug offense and the issue is whether or not that is applicable in view of the fact that he's charged in Count Three with the same gun.

MS. GARLAND: I think it would be applicable had he not pled guilty to the firearm offense, but because he's pled to a firearm offense the Government doesn't have an objection to the Court not applying that enhancement.

THE COURT: All right. You stand by the objection, I assume, Mr. Mendelsohn?

MR. MENDELSOHN: I would, Judge. I would also object to the factual paragraph in Paragraph 24 which is the statement by the codefendant that brings this issue into play. It's basically his word against hers about that particular issue. I have concerns that that paragraph may cause issues with the Bureau of Prisons. For example, getting into drug programs or security levels. So I ask the Court to remove that paragraph going forward.

THE COURT: All right. I'll sustain your objection and I'll ask the probation officer to redact that particular paragraph, as alleged, from the presentence report that will go to the Bureau of Prisons.

That will change your guideline range without objection. The guideline range will be 32 based on the amount of drugs and there is an issue of acceptance of responsibility. The Government recommends a third point?

MS. GARLAND: Yes, Your Honor.

THE COURT: That would take it to 29, then. Level 29 is a Criminal History Category of 36—Criminal History Category of VI, 151 to 188; am I not correct?

THE PROBATION OFFICER: Your Honor, the drugs were a Level 34.

THE COURT: Well, we gave 3 points credit for acceptance of responsibility.

THE PROBATION OFFICER: Yes, Your Honor.

THE COURT: And we took off the 2 points. Oh, I see what you're talking about. 34 to begin with and 2 points would be 31 then?

MS. GARLAND: That's the one I show, 31, Criminal History Category VI.

THE COURT: 31?

MR. MENDELSOHN: Yes, sir.

THE COURT: All right. 168 to 210. Thank you for finally getting it right.

MS. GARLAND: Judge, not to be picky since it's a binding plea, but my notes show 188 to 235 because what Offense Level 31, Criminal History Category VI would be.

THE COURT: Yes, I agree with you about that. We're back to what I had originally put down before I came in here.

So the Court's sentencing options without regard to the binding plea agreement is on Count One a minimum mandatory 10 years up to life and a $10 million fine. On Count Three not more than 10 years and a $250,000 fine. The total Offense Level is 31. The Criminal History Category is VI. Custody guideline range on Count One is 188 to 235 months. The fine guideline range—of course, then we've got Count Three. The fine guideline range is $17,500 to $10,250,000. There's no restitution. A $200 mandatory special assessment is required as part of the sentence. Cost of confinement is estimated at $28,948 a year. The cost of supervision is estimated at $3,347.41 a year. Probation is not an option the Court may consider. There is a forfeiture provision. Supervised release of at least 5 years is required as a part of the sentence on Count One and not more than 3 years supervised release on Count Three.

I'll be glad to hear from counsel on sentencing and the defendant. And I understood that one of the

defendant's relatives is here and may want to address the Court. Defense counsel can let me know about whether or not that is requested.

MR. MENDELSOHN: Yes, Judge. His 14-year-old daughter, Shayla Hughes, is here and would like to address the Court.

THE COURT: I'll be happy to hear from her.

MR. MENDELSOHN: And his mother also is here.

THE COURT: All right. I'll be glad to hear from both of them.

MR. MENDELSOHN: Great. Thank you, Judge.

MS. HUGHES: Good afternoon. They say your dad is the only person you really trust, but I lost mine. It's been over 10 years this time. Everyone tells me I should be—I should be getting over it by now, but it seems like it's only getting worse. This is anything but new. I remember the first time he got caught. He told me he was going to change. Why am I here speaking today? Because of the power methamphetamines have in his life, leaving him to make foolish choices and decisions.

You don't really know my dad, but doing your job in this federal system, you caught my dad doing wrong. That couldn't change the fact my dad is a good man. He's loving, caring, helpful and a strong man when he's completely sober. You see him covered with

tattoos, he seems like he's a tough guy, but he's a big guy with an addiction, not able to be on his own.

If you start at the age I currently am now, being 14 years old, methamphetamine had him before he turned 16. Before in 2007 my dad promised me he was going to change, but it always slipped through his fingers. He stayed clean 16 months without any problem with family support. I tried to help. I begged him to stop and I'd do anything to have my dad back, but not the old dad, the one that loved me and took care of me.

It's been hard growing up for me. My dad was here unless he was in jail or prison. Usually my unsupportive mom, she threw me off one hand when I was a baby, yet has my brother weekly unless she needs something. I know in my heart they loved me, but it's hard to get past that.

My grandparents, as I grow up, I see their health deteriorate. I'll not be able to call my parents when I need advice. My dad calls me. I had two visits with him for 2013. I'll be the first person to tell you that a 30-minute visitation goes by fast.

I wish my dad would be here to see me walk down the aisle and hear me say those famous words "I do," be here with my kids. He's not going to see me walk across the stage on graduation, come to senior prom. My dad's helped me to be brave. I try not to cry. I love my dad. Nobody knows but myself. My dad isn't the only person I've lost. In 2007 I lost my grandpa due to a meth overdose. My mom has been a meth addict before, too.

The only bit of peace with my dad is being the fact he's supposed to be safe. Now there's some hope your system will be able to overcome his addiction. I have to live off memories my dad and I made together. They say I'm strong. Obviously that means I have no feelings and I can be ignored. Am I strong? My dad asked myself daily why can't he stop. I hate saying meth ruined my world when I wasn't even the person using it. I guess that's really powerful of a drug.

I want you to know that my dad isn't just 65026-019. He has friends, family, and a daughter at home. None of this is my dad. There's nothing I can say or do that is—there's nothing I can say or do anymore to help besides support my dad through all the years he's facing. The only thing I can ask for is some sort of mercy on him.

This is for anyone with a drug addiction. Teardrops fall. My life falls. A pain in my body, pain in my heart. So many broken people, so many broken souls. They've been through so much pain. Not the smartest person knows life is a battle, life is a fight, every day drags, every night. [Unintelligible.] Everyone is special I see in this room, they're all making changes not the way they assumed. They take it step by step. They done wrong, they know they made mistakes. Teardrops fall means always shine in cloudy weather.

THE COURT: Thank you.

MR. MENDELSOHN: Judge, this is Cathy Duckworth, his mother.

THE COURT: Good afternoon.

MS. DUCKWORTH: Your Honor, I know this is a bad day for you, a terrible day for you.

THE COURT: I'll be glad to hear from you.

MS. DUCKWORTH: You know, now, sitting right there thinking what I wanted to say to you, Your Honor, I decided I'd like to tell you a little bit about my son growing up and some things are bad. I had to work. I don't have a high school education. I worked making $4 an hour. I did have a deadbeat husband that beat on my children, but I had to provide a roof over their head. I struggled. There were times that I had my power cut off and everything else, but I kept pushing through for my children. And then I got in charge and the Lord saved me one day and I thank God for that, and then my husband got in church with me. My kids were little and he was in a singing group then. He run off with a woman and got married to her which y'all don't know me, but the Lord knows me, and I've struggled trying to raise my kids. I've always had to work until about three years ago. I've got COPD, I've got emphysema. They went down with a light and told me my lungs was black. I've been struggling with this disease now. If you'd seen me six months ago you would have said I was healthy as a horse, but I've dropped 40 pounds. I've been going back and forth to the doctor. I've got to go March the 12th. They wanting to send me to a cancer doctor to see if they can find something because of the weight. I'm a mom. I love my children, God knows I do. I stay on my knees and I thank God my son is safe, I really do. I want to thank you. But the time he is missing

with his daughter, he's not—I think he more or less got caught up into this about the money. I know he was set up and it was all about the money. But my son's an addict and he needs help with his drug addiction—addiction, I can't talk right.

But I would ask you—beg you for mercy. If there's any way possible you could reduce his sentence just by a little bit, just by a little bit so he can have that time with his daughter. We're trying to raise Shayla right now. Erik's really a good person when he's straight and he's working. I mean, he has really helped us with her. I don't know what else to say. I love my son, I really do. I love him and I want what's best for him and I want what's best for his daughter. I know that the 15 years that he's looking at, I'm not going to be here, I do know that.

THE COURT: Well, I'm going to put some provisions in this sentence that will do part of what you're asking. I'm going to give him some provisions that will help him while he's in prison and help him when he gets out.

MR. MENDELSOHN: Well, Judge—

THE COURT: And I know you love your son dearly and this is not a pleasant day for me and not a pleasant day for you or anybody in the courtroom.

MR. MENDELSOHN: Judge, I don't know that I can say anything much better than what Shayla and Ms. Duckworth have said, but I think you see from them that this is about somebody who has an addiction and that addiction has controlled him for a

large part of his adult life. But the fact that he's got a daughter who's as special and fabulous as she is at age 14 and says the kind of things she said to you today I think shows that he has been a good influence on her and he has done well by her and hopefully will continue to do that in the future.

So with that, we would, of course, ask the Court to accept the binding plea and understand who Mr. Hughes is and where he will end up once he gets out from this. I also would like the Court—to thank the Court for hearing from these two people, especially Shayla, because I think it was very important for her to say those words, both to the Court and to her father.

THE COURT: Thank you, Mr. Mendelsohn.

If you'd come around, Mr. Hughes.

Ms. Garland, anything you want to say?

MS. GARLAND: Judge, I would just stand by the Government's recommendation that this be a binding plea binding on the Court and on the defendant for 180 months.

THE COURT: All right.

MS. GARLAND: We make this recommendation in light of the fact that he was facing life without parole with his prior convictions and the kind of drug quantities that were involved here and so although it seems like a very harsh sentence, being 15 years, it's much better than what he would have faced, up to 20.

THE COURT: Thank you.

Anything you want to say, Mr. Hughes?

THE DEFENDANT: Yes, sir.

First, I'd like to apologize to my family for being here. I've let methamphetamines ruin my life and I'm 1 sorry. I'm sorry for you having to hear this case today. I would just ask for some leniency, if you could. I know I've got to pay for the crime I committed. I don't want to say the wrong thing and try to break my binding plea so I would just ask you to be as lenient as you could, if you could. I was selling drugs to support my habit. I'm not a sex offender, I'm not a violent person, I don't have any of those kind of crimes. I'm just a full-fledged junky, that's it, with a habit. I've never prospered anything from it except for my ways of being able to support my addiction, that's it. I worked here and there at times, but I've always been able to support my addiction through drugs and that's the wrong way to go about it, that's the wrong style of life and I just—like I said, I was working for my codefendant to pay for my addiction and what's crazy about it is the man I worked for never even used drugs in his life and could allow me to be in the situation I'm in to support my habit and I just—like I said, I ask for any leniency, if you could. I know there's a minimum of 10 years, but the prosecutor's right, I could be facing life or getting life, but I just—I don't really know what else to say. I'm scared of breaking this plea agreement.

THE COURT: Well, you're not breaking it. Wait a minute. I need to pronounce the sentence. I

had a very thorough plea, a very thorough presentence report in this case, and I know that your mother's had a tough time and been very supportive of you, and this habit you've got is hell for you and your family.

Pursuant to the Sentencing Reform Act of 1984, it's the judgment of the Court that the defendant, Erik Hughes, be and is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 180 months as to Count One and 120 months as to Count Three to be served concurrently with Count One for a total sentence of 180 months.

It's further ordered that the defendant shall pay to the United States a mandatory special assessment of $200 which shall be due immediately. The Court finds that the defendant does not have the ability to pay a fine and the cost of incarceration and the Court will waive a fine and the cost of incarceration in this case.

Upon release from imprisonment the defendant shall be placed on supervised release for a period of 5 years as to Count One and 3 years as to Count Three with Count Three to run concurrent with Count One.

Within 72 hours of release from the custody of the Bureau of Prisons the defendant shall report in person to the United States Probation Office in the district to which the defendant is released. While on supervised release the defendant shall not commit another federal, state or local crime, shall comply

with the standard conditions that have been adopted by this Court, and shall comply with the following additional conditions:

The defendant shall refrain from any unlawful use or possession of a controlled substance and submit to one drug urinalysis within 15 days after being placed on supervision and at least two periodic tests thereafter.

The defendant shall not own, possess or have under his control any firearm, dangerous weapon or other destructive device. The defendant shall submit to a search of his person, property, both real, personal or rental, residence, office, and vehicle at reasonable times in a reasonable manner based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other residents of the premises that same are subject to searches pursuant to this condition of supervised release. The defendant shall participate in a drug and alcohol treatment program as directed by the United States Probation Officer and, if able, contribute to the cost of such services.

The defendant shall participate in a mental health evaluation and counseling, if deemed necessary or appropriate by the United States Probation Officer, and, if able, the defendant shall be required to contribute to the cost of services for such treatment. The defendant shall perform 100 hours of community service as directed by the United States Probation Officer in lieu of a payment of a fine or the cost of incarceration in this case.

Pursuant to 42 USC, Section 14135a(d)(1) and 10 USC, Section 1565(d), which requires mandatory DNA testing for federal offenders involving a felony offense, the defendant shall cooperate in the collection of a DNA sample as required by the United States Probation Officer.

The Court enters a forfeiture order upon the following items. $14,124 in United States currency seized from Erik Hughes on April the 19th, 2013; a Smith & Wesson 357-caliber pistol with an obliterated serial number seized from Erik Hughes referenced in Count Three of the indictment; $36,670—$970 in United States currency seized from Joshua Andrews on April the 19th, 2013, same hereby being forfeited.

The Court recommends that the defendant be allowed to participate in the 500-hour intensive drug and alcohol treatment program while incarcerated.

Do you have any requests as to where the Court should recommend that this gentleman be allowed to serve his sentence, Mr. Mendelsohn?

MR. MENDELSOHN: Judge, as close to Dalton as possible.

THE COURT: The Court recommends that this defendant be allowed to serve his sentence at the federal facility at Talladega, Alabama, or some other place in the general area of north Georgia.

You have a right to appeal to a higher court from what the Court's done in this case, to the extent

you've not given up your right to appeal to a higher court. If you do want to appeal to a higher court, you have to do so within 14 days from today or you forever lose your right to appeal to a higher court.

If you want to appeal to a higher court and you don't have the money to hire a lawyer to handle your case on appeal, the Court will appoint a lawyer to represent you on appeal and you can appeal to a higher court without any cost whatsoever to yourself.

In imposing this sentence the Court has accepted the binding plea agreement between the parties. I explained at the time of approving the binding plea agreement the reasons I've done so and for the reasons that I've stated at that time, the Court concludes and finds that it has imposed a reasonable sentence in this case compatible with the advisory United States Sentencing Guidelines but in accordance with the mandatory matters the Court is required to consider in ultimately determining a sentence.

The Court would state for the record that in the opinion of the Court the Government has acted very reasonably in connection with their recommendation in this case and defense counsel has acted very reasonably with his recommendation in this case as to what each lawyer believes to be a fair and reasonable sentence under the circumstances.

The Court is convinced it has imposed a reasonable sentence and the judgment of the defendant himself accepting this plea is the judgment of an individual who has the ability to overcome his addiction and be

a productive citizen, and I hope you'll maintain that sense of logic, Mr. Hughes.

If there's nothing further, then, that completes the sentencing in the case.

Do you want to put an exception in the record, Mr. Mendelsohn?

MR. MENDELSOHN: No, Judge. Thank you.

THE COURT: Ms. Garland?

MS. GARLAND: Nothing from the Government, Your Honor.

THE COURT: All right. We'll be in recess.

THE CLERK: All rise, please. This Honorable Court's in recess until further order.

[proceedings concluded at 2:25 p.m.]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

CERTIFICATE OF REPORTER

I do hereby certify that the foregoing pages are a true and correct transcript of the proceedings taken down by me in the case aforesaid.

This the 2nd day of February, 2016.

/S/ Alicia B. Bagley
ALICIA B. BAGLEY, RMR, CRR

OFFICIAL COURT REPORTER
(706) 378-4017

APPENDIX D

GUILTY PLEA and PLEA AGREEMENT

United States Attorney
Northern District of Georgia

ORIGINAL

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION
CRIMINAL NO. 4:13-CR-43-HLM-WEJ

The United States Attorney for the Northern District of Georgia ("the Government") and Defendant ERIK HUGHES, enter into this plea agreement as set forth below in Part IV pursuant to Rule 11 (c)(1)(C) of the Federal Rules of Criminal Procedure. ERIK HUGHES, Defendant, having received a copy of the above-numbered Indictment and having been arraigned, hereby pleads GUILTY to Counts One and Three.

I. ADMISSION OF GUILT

1. The Defendant admits that he is pleading guilty because he is in fact guilty of the crimes charged in Counts One and Three.

II. ACKNOWLEDGMENT & WAIVER OF RIGHTS

2. The Defendant understands that by pleading guilty, he is giving up the right to plead not guilty and the right to be tried by a jury. At a trial, the Defendant

would have the right to an attorney, and if the Defendant could not afford an attorney, the Court would appoint one to represent the Defendant at trial and at every stage of the proceedings. During the trial, the Defendant would be presumed innocent and the Government would have the burden of proving him guilty beyond a reasonable doubt. The Defendant would have the right to confront and cross-examine the witnesses against him. If the Defendant wished, he could testify on his own behalf and present evidence in his defense, and he could subpoena witnesses to testify on his behalf. If, however, the Defendant did not wish to testify, that fact could not be used against him, and the Government could not compel him to incriminate himself. If the Defendant were found guilty after a trial, he would have the right to appeal the conviction.

3. The Defendant understands that by pleading guilty, he is giving up all of these rights and there will not be a trial of any kind.

4. By pleading guilty, Defendant also gives up any and all rights to pursue any affirmative defenses, Fourth Amendment or Fifth Amendment claims, and other pretrial motions that have been filed or could have been filed.

5. The Defendant also understands that he ordinarily would have the right to appeal his sentence and, under some circumstances, to attack the conviction and sentence in post-conviction proceedings. By entering this Plea Agreement, the Defendant may be waiving some or all of those rights

to appeal and to collaterally attack his conviction and sentence, as specified below.

6. Finally, the Defendant understands that, to plead guilty, he may have to answer, under oath, questions posed to him by the Court concerning the rights that he is giving up and the facts of this case, and the Defendant's answers, if untruthful, may later be used against him a prosecution for perjury or false statements.

III. ACKNOWLEDGMENT OF PENALTIES

7. The Defendant understands that, based on his plea of guilty, he will be subject to the following maximum and mandatory minimum penalties:

As to Count One:

a. Maximum term of imprisonment: Life.

b. Mandatory minimum term of imprisonment: 10 years.

c. Term of supervised release: 5 year(s) to Life.

d. Maximum fine: $10,000,000.00, due and payable immediately.

e. Full restitution, due and payable immediately, to all victims of the offense(s) and relevant conduct.

f. Mandatory special assessment: $100.00, due and payable immediately.

g. Forfeiture of any and all proceeds from the commission of the offense, any and all property used or intended to be used to facilitate the offense, and any property involved in the offense.

As to Count Three:

h. Maximum term of imprisonment: 10 years.

i. Mandatory minimum term of imprisonment: None.

j. Term of supervised release: 3 year(s) to 5 years.

k. Maximum fine: $250,000.00, due and payable immediately.

l. Full restitution, due and payable immediately, to all victims of the offense(s) and relevant conduct.

m. Mandatory special assessment: $100.00, due and payable immediately.

n. Forfeiture of any and all proceeds from the commission of the offense, any and all property used or intended to be used to facilitate the offense, and any property involved in the offense.

8. The Defendant understands that, before imposing sentence in this case, the Court will be required to consider, among other factors, the provisions of the United States Sentencing Guidelines and that, under certain circumstances, the Court has the discretion to depart from those Guidelines. The Defendant further understands that the Court may impose a sentence up to and including the statutory maximum as set forth in this paragraph and that no one can predict his exact sentence at this time.

IV. PLEA AGREEMENT

9. The Defendant, his counsel, and the Government, subject to approval by the Court, have agreed upon a negotiated plea in this case, the terms of which are as follows:

Binding Sentencing Recommendation to the Court

10. This plea is entered under the specific provisions of Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure (Fed. R. Cr. P.). As a product of negotiations between the parties and in exchange for the government dismissing otherwise provable counts against the Defendant, the Defendant and the Government expressly recommend that the Court should impose a sentence of 180 months of imprisonment as the appropriate custodial sentence in this case. Under the provisions of Fed. R. Cr. P. 11(c)(1)(C), this recommendation would bind the Court to impose this particular custodial sentence if the Court accepts this plea agreement.

Dismissal of Counts

11. The Government agrees that, upon the entry of the Judgment and Commitment Order, any and all remaining counts in the above-styled case still pending against Defendant shall be dismissed pursuant to Standing Order No. 07-04 of this Court and to Rule 48(a) of the Federal Rules of Criminal Procedure. The Defendant understands that the Probation Office and the Court may still consider the conduct underlying such dismissed counts in determining relevant conduct under the Sentencing Guidelines and a reasonable sentence under Title 18, United States Code, Section 3553(a).

Section 851 Dismissal

12. The Government agrees that it will not pursue the applicable Title 21, Section 851 sentencing enhancements.

Sentencing Guidelines Recommendations

13. Based upon the evidence currently known to the Government, the Government agrees to make the following recommendations and/or to enter into the following stipulations.

Right to Answer Questions, Correct Misstatements, and Make Recommendations

14. The Government reserves the right to inform the Court and the Probation Office of all facts and circumstances regarding the Defendant and this case, and to respond to any questions from the Court and the Probation Office and to any misstatements of

fact or law. Except as expressly stated elsewhere in this Plea Agreement, the Government also reserves the right to make recommendations regarding application of the Sentencing Guidelines.

Right to Modify Recommendations

15. With regard to the Government's recommendation as to any specific application of the Sentencing Guidelines as set forth elsewhere in this Plea Agreement, the Defendant understands and agrees that, should the Government obtain or receive additional evidence concerning the facts underlying any such recommendation, the Government will bring that evidence to the attention of the Court and the Probation Office. In addition, if the additional evidence is sufficient to support a finding of a different application of the Guidelines, the Government will not be bound to make the recommendation set forth elsewhere in this Plea Agreement, and the failure to do so will not constitute a violation of this Plea Agreement.

Cooperation

General Requirements

16. The Defendant agrees to cooperate truthfully and completely with the Government, including being debriefed and providing truthful testimony at any proceeding resulting from or related to Defendant's cooperation. Defendant agrees to so cooperate in any investigation or proceeding as requested by the Government. Defendant agrees that

Defendant's cooperation shall include, but not be limited to:

a. producing all records, whether written, recorded, electronic, or machine readable, in his actual or constructive possession, custody, or control, of evidentiary value or requested by attorneys and agents of the Government;

b. making himself available for interviews, not at the expense of the Government if he is on bond, upon the request of attorneys and agents of the Government;

c. responding fully and truthfully to all inquiries of the Government in connection with any investigation or proceeding, without falsely implicating any person or intentionally withholding any information, subject to the penalties of making false statements (18 U.S.C. § 1001), obstruction of justice (18 U.S.C. § 1503) and related offenses;

d. when called upon to do so by the Government in connection with any investigation or proceeding, testifying in grand jury, trial, and other judicial proceedings, fully, truthfully, and under oath, subject to the penalties of perjury (18 U.S.C. § 1621), making

false statements or declarations in grand jury or court proceedings (18 U.S.C. § 1623), contempt (18 U.S.C. §§ 401 - 402), obstruction of justice (18 U.S.C. § 1503), and related offenses.

The Defendant understands that the Government alone will determine what forms of cooperation to request from the Defendant, and the Defendant agrees that Defendant will not engage in any investigation that is not specifically authorized by the Government.

Section 1B1.8 Protection

17. Pursuant to Section 1B1.8 of the Sentencing Guidelines, the Government agrees that any self-incriminating information that was previously unknown to the Government and is provided to the Government by the Defendant in connection with Defendant's cooperation and as a result of this Plea Agreement will not be used in determining the applicable sentencing guideline range, although such information may be disclosed to the Probation Office and the Court. The Government also agrees not to bring additional charges against the Defendant, with the exception of charges resulting from or related to violent criminal activity, based on any information provided by the Defendant in connection with cooperation that was not known to the Government prior to the cooperation. However, if the Government determines that the Defendant has not been completely truthful and candid in his cooperation with the Government, he may be subject to prosecution for perjury, false statements,

obstruction of justice, and any other appropriate charge, and all information Defendant has provided may be used against Defendant in such a prosecution. Furthermore, should the Defendant withdraw his guilty plea in this case and proceed to trial, the Government is free to use any statements and/or other information provided by the Defendant, pursuant to the Defendant's cooperation, as well as any information derived therefrom, during any trial or other proceeding related to the Government's prosecution of the Defendant for the offense(s) charged in the above-numbered Counts One and Three.

Sentencing Recommendations

Specific Sentence Recommendation

18. The parties agree that the Defendant should be sentenced to 180 months.

Defendant Unable to Pay Fine

19. Based on the information currently available to it, the Government agrees to recommend that the Defendant does not have the financial resources to pay a fine.

Forfeiture

20. The Defendant acknowledges that each asset listed below is subject to forfeiture and agrees that he shall immediately forfeit to the United States any proceeds from, property used or intended to be used to facilitate, and property involved in the

commission of the offenses in Counts One and Three, including, but not limited to, the following:

a. $14,124.00 in United States currency seized on or about April 19, 2013;

b. The Smith and Wesson .357 caliber pistol with obliterated serial number referenced in Count Three of the Indictment; and

c. $36,970.00 in United States currency seized on or about April 17, 2013, from Joshua Wayne Andrews;

21. The Defendant waives and abandons all right, title, and interest in the all of the property listed above (referred to hereafter, collectively, as the Subject Property) and agrees to the administrative or judicial forfeiture of the Subject Property. In addition, the Defendant waives and abandons his interest in any other property that may have been seized in connection with this case. The Defendant agrees to the administrative or judicial forfeiture or the abandonment of any seized property.

22. The Defendant states that he is the sole and rightful owner of the $14,124.00 in United States currency and the Smith and Wesson .357 caliber pistol, that to the best of his knowledge no other person or entity has any interest in those two items, and that he has not transferred, conveyed, or encumbered his interest in them. The Defendant agrees to take all steps requested by the United States to facilitate transfer of title of the Subject

Property, including providing and endorsing title certificates, or causing others to do the same where third parties hold nominal title on the Defendant's behalf, to a person designated by the United States. The Defendant agrees to take all steps necessary to ensure that the Subject Property is not hidden, sold, wasted, destroyed, or otherwise made unavailable for forfeiture. The Defendant agrees not to file any claim, answer, or petition for remission or restitution in any administrative or judicial proceeding pertaining to the Subject Property, and if such a document has already been filed, the Defendant hereby withdraws that filing.

23. The Defendant agrees to hold the United States and its agents and employees harmless from any claims made in connection with the seizure, forfeiture, or disposal of property connected to this case. The Defendant acknowledges that the United States will dispose of any seized property, and that such disposal may include, but is not limited to, the sale, release, or destruction of any seized property, including the Subject Property. The Defendant agrees to waive any and all constitutional, statutory, and equitable challenges in any manner (including direct appeal, a Section 2255 petition, habeas corpus, or any other means) to the seizure, forfeiture, and disposal of any property seized in this case, including the Subject Property, on any grounds.

24. The Defendant consents to the Court's entry of a preliminary order of forfeiture against the Subject Property, which will be final as to him, a part of his sentence, and incorporated into the judgment against him.

Financial Cooperation Provisions

Special Assessment

25. The Defendant understands that the Court will order him to pay a special assessment in the amount of $200.

Fine/Restitution—Terms of Payment

26. The Defendant agrees to pay any fine and/or restitution imposed by the Court to the Clerk of Court for eventual disbursement to the appropriate account and/or victim(s). The Defendant also agrees that the full fine and/or restitution amount shall be considered due and payable immediately. If the Defendant cannot pay the full amount immediately and is placed in custody or under the supervision of the Probation Office at any time, he agrees that the custodial agency and the Probation Office will have the authority to establish payment schedules to ensure payment of the fine and/or restitution. The Defendant understands that this payment schedule represents a minimum obligation and that, should Defendant's financial situation establish that he is able to pay more toward the fine and/or restitution, the Government is entitled to pursue other sources of recovery of the fine and/or restitution. The Defendant further agrees to cooperate fully in efforts to collect the fine and/or restitution obligation by any legal means the Government deems appropriate. Finally, the Defendant and his counsel agree that the Government may contact the Defendant regarding the collection of any fine and/or restitution without notifying and outside the presence of his counsel.

Financial Disclosure

27. The Defendant agrees that Defendant will not sell, hide, waste, encumber, destroy, or otherwise devalue any such asset worth more than $500 before sentencing, without the prior approval of the Government. The Defendant understands and agrees that Defendant's failure to comply with this provision of the Plea Agreement should result in Defendant receiving no credit for acceptance of responsibility.

28. The Defendant agrees to cooperate fully in the investigation of the amount of restitution and fine; the identification of funds and assets in which he has any legal or equitable interest to be applied toward restitution and/or fine; and the prompt payment of restitution or a fine.

Limited Waiver of Appeal

29. LIMITED WAIVER OF APPEAL: To the maximum extent permitted by federal law, the Defendant voluntarily and expressly waives the right to appeal his conviction and sentence and the right to collaterally attack his conviction and sentence in any post-conviction proceeding (including, but not limited to, motions filed pursuant to 28 U.S.C. § 2255) on any ground, except that the Defendant may file a direct appeal of an upward departure or variance above the sentencing guideline range as calculated by the district court. The Defendant understands that this Plea Agreement does not limit the Government's right to appeal, but if the Government initiates a direct appeal of the sentence imposed, the Defendant may file a cross-appeal of that same sentence.

privacy protections to permit the Government to access his credit report and tax information held by the Internal Revenue Service.

30. So long as the Defendant is completely truthful, the Government agrees that anything related by the Defendant during his financial interview or deposition or in the financial forms described above cannot and will not be used against him in the Government's criminal prosecution. However, the Government may use the Defendant's statements to identify and to execute upon assets to be applied to the fine and/or restitution in this case. Further, the Government is completely free to pursue any and all investigative leads derived in any way from the interview(s)/deposition(s)/financial forms, which could result in the acquisition of evidence admissible against the Defendant in subsequent proceedings. If the Defendant subsequently takes a position in any legal proceeding that is inconsistent with the interview(s)/deposition(s)/financial forms-whether in pleadings, oral argument, witness testimony, documentary evidence, questioning of witnesses, or any other manner—the Government may use the Defendant's interview(s)/deposition(s)/ financial forms, and all evidence obtained directly or indirectly therefrom, in any responsive pleading and argument and for cross-examination, impeachment, or rebuttal evidence. Further, the Government may also use the Defendant's interview(s)/deposition(s)/ financial forms to respond to arguments made or issues raised sua sponte by the Magistrate or District Court.

Limited Waiver of Appeal

31. LIMITED WAIVER OF APPEAL: To the maximum extent permitted by federal law, the Defendant voluntarily and expressly waives the right to appeal his conviction and sentence and the right to collaterally attack his conviction and sentence in any post-conviction proceeding (including, but not limited to, motions filed pursuant to 28 U.S.C. § 2255) on any ground, except that the Defendant may file a direct appeal of an upward departure or variance above the sentencing guideline range as calculated by the district court. The Defendant understands that this Plea Agreement does not limit the Government's right to appeal, but if the Government initiates a direct appeal of the sentence imposed, the Defendant may file a cross-appeal of that same sentence.

Miscellaneous Waivers

FOIA/Privacy Act Waiver

32. The Defendant hereby waives all rights, whether asserted directly or by a representative, to request or receive from any department or agency of the United States any records pertaining to the investigation or prosecution of this case, including, without limitation, any records that may be sought under the Freedom of Information Act, Title 5, United States Code, Section 552, or the Privacy Act of 1974, Title 5, United States Code, Section 552a.

Section 851 Dismissal & Waiver of Right to Challenge Prior Convictions

33. In consideration of the benefits received by Defendant under the terms of this Plea Agreement, including, but not limited to, the dismissal of the Section 851 sentencing enhancement Information, Defendant agrees that he will not challenge, either directly or collaterally, in any manner, any prior sentence and/or conviction in any court. Defendant further agrees that, in the event that a prior sentence or conviction is vacated, this event will not serve as the basis for a reduced sentence in any collateral attack on the sentence in this case.

No Other Agreements

34. There are no other agreements, promises, representations, or understandings between the Defendant and the Government.

In Open Court this 19th day of December, 2013.

/s/ Brian Mendelsohn	/s/ Erik Hughes
SIGNATURE (Attorney for Defendant)	SIGNATURE (Defendant)
Brian Mendelsohn	ERIK HUGHES
/s/ Angela Marie Garland	
SIGNATURE (Assistant U.S. Attorney)	
Angela Marie Garland	

/s/ Katherine M. Hoffer
SIGNATURE
(Approving Official)

I have read the Indictment against me and have discussed it with my attorney. I understand the charges and the elements of each charge that the Government would have to prove to convict me at a trial. I have read the foregoing Plea Agreement and have carefully reviewed every part of it with my attorney. I understand the terms and conditions contained in the Plea Agreement, and I voluntarily agree to them. I also have discussed with my attorney the rights I may have to appeal or challenge my conviction and sentence, and I understand that the appeal waiver contained in the Plea Agreement will prevent me, with the narrow exceptions stated, from appealing my conviction and sentence or challenging my conviction and sentence in any post-conviction proceeding. No one has threatened or forced me to plead guilty, and no promises or inducements have been made to me other than those discussed in the Plea Agreement. The discussions between my attorney and the Government toward reaching a negotiated plea in this case took place with my permission. I am fully satisfied with the representation provided to me by my attorney in this case.

/s/ Erik Hughes	12/19/13
SIGNATURE	DATE
(Defendant)	
ERIK HUGHES	

I am ERIK HUGHES's lawyer. I have carefully reviewed the charges and the Plea Agreement with my client. To my knowledge, my client is making an informed and voluntary decision to plead guilty and to enter into the Plea Agreement.

/s/ Brian Mendelsohn — 12/19/13
SIGNATURE (Defense Attorney) — DATE
Brian Mendelsohn

Brian Mendelsohn
Federal Defender
Program

Centennial Tower

101 Marietta Street,
N.W.,

Suite 1500
Atlanta, GA 30303
(404)688-7530

_____ State Bar of Georgia Number

ERIK HUGHES
USMS

Filed in Open Court

This _ day of __, 20__

By _____

FILED IN OPEN COURT
James N. Hatten, Clerk

By:

Deputy Clerk

U. S. DEPARTMENT OF JUSTICE

Statement of Special Assessment Account

This statement reflects your special assessment only. There may be other penalties imposed at sentencing.

ACCOUNT INFORMATION	
CRIMINAL ACTION NO.:	4:13-CR-43-HLM-WEJ
DEFENDANT'S NAME:	ERIK HUGHES
PAY THIS AMOUNT:	$200

Instructions:

1. Payment must be made by **certified check** or **money order** payable to:

Clerk of court, U.S. District Court
personal checks will not be accepted

2. Payment must reach the clerk's office within 30 days of the entry of your guilty plea

3. Payment should be sent or hand delivered to:

Clerk, U.S. District Court
600 East First Street
Rome, Georgia 30161
(Do Not Send Cash)

4. Include defendant's name on **certified check** or **money order**.

5. Enclose this coupon to insure proper and prompt application of payment.

6. Provide proof of payment to the above-signed AUSA within 30 days of the guilty plea.

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

UNITED STATES OF AMERICA, Plaintiff, vs. ERIK HUGHES #65026-019, Defendant. _____/	CASE NO. 4:13-CR-43-01-HLM **FILED IN CLERK'S OFFICE** U.S.D.C. Rome JUN 15 2015 JAMES N. HATTEN, Clerk By: Deputy Clerk

DEFENDANT'S MOTION FOR REDUCTION OF SENTENCE
Pursuant to 18 U.S.C. § 3582(c)(2)

TO THE HONORABLE COURT:

COMES NOW, the Defendant, Erik Hughes, appearing this day pro se and without the aid of counsel, who respectfully moves this Honorable Court for a reduction of his current sentence of 180 months, pursuant to 18 U.S.C. § 3582(c)(2), following Amendment 782 to the United States Sentencing Guidelines, and states:

BACKGROUND

On or about December 19, 2013, Defendant pled guilty to Counts One and Three of a four count indictment, charging, conspiracy to possess with intent to distribute 500 grams or more of methamphetamine, in violation of 21 U.S.C. § 841(b)(1)(A)(viii) & § 846(Count One); possessing with intent to distribute 50 grams or more of methamphetamine, in violation of 21 U.S.C. § 841(a)(1), § 841(b)(1)(B)(viii) and § 846 (Count Two); possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. § 922(g)(1) (Count Three); and possessing a firearm having an obliterated serial number, in violation of 18 U.S.C. § 922(k) (Count Four). See Plea Agreement at (Doc. 54).

Defendant appeared before this Honorable Court for sentencing, on or about March 3, 2014, at which time this Honorable Court sentenced Defendant to a term of 180 months imprisonment, to be followed by a term of 5 years supervised release. See Judgment at (Doc. 69).

Defendant did not file a Notice of Appeal, nor pursue a direct appeal from his judgment of conviction, however, brings the instant motion for a reduction of his sentence, pursuant to 18 U.S.C. § 3582(c)(2), following Amendment 782 to the U.S. Sentencing Guidelines.

REASONS FOR REDUCING SENTENCE UNDER AMENDMENT 782

Defendant maintains, as an initial matter, that he is entitled to a reduction of his sentence under Amendment 782 because his sentence was based on a sentencing range which was later reduced by the Sentencing Commission, particularly, via Amendment 782.

Specifically, in *United States v. Dews*, 551 F.3d 204 (4th Cir. 2008), the Fourth Circuit held that a court could modify a defendant's sentence pursuant to a Rule 11(c)(1)(C) agreement. There, the court stated that "a sentence may be both a guideline-based sentence eligible for treatment under § 3582(c)(2) and a sentence stipulated to by the parties in a plea agreement. *See Dews* at 209.

Other courts have adopted a fact-specific, case-by-case approach to determining whether Rule 11(c)(1)(C) plea agreements are based on the Guidelines. *See, e.g., United States v. Franklin*, 600 F.3d 893, 897 (7th Cir. 2010) (holding that defendants pleading guilty pursuant to Rule 11(c)(1)(C) agreements may be entitled to reductions under § 3582); *United States v. Cobb*, 584 F.#d 979, 985 (10th Cir. 2009) ("If we categorically removed Rule 11 pleas from the reach of § 3582, it would perpetuate the very disparity § 3582 and the retroactive application of Amendment 706 were meant to correct."); *United States v. Bride*, 581 F.3d 888, 891 (9th Cir. 2009) (stating that "the terms of the plea agreement are key to determining whether the defendant's sentence was, in fact, based on the

sentencing range that was later reduced by the Sentencing Commission").

In the instant case subjudice, it is obvious that Defendant's sentence was based on the Sentencing Guidelines. In plea discussions, it was discussed that Defendant's Guideline range was 188-235 months. Agreeing to a term of imprisonment as close to the bottom of the Guidelines possible, the parties reached an agreement that Defendant would plead guilty under Rule 11(c)(1)(C) and the Government would agree to a sentence of 180 months imprisonment, 8 months below the bottom of Defendant's otherwise applicable Guideline range.

Although the Government also dismissed Counts Two and Four pursuant to the Rule 11(c)(1)(C) agreement, such dismissal of those two miscellaneous counts did nothing to lower the potential sentence faced by Defendant without the Rule 11(c)(1)(C) agreement. In fact, the counts that Defendant pleaded guilty to, Counts One and Three, were the most severe counts, and Count One would have been the Count to have determined the potential sentence faced even with a plea to all four counts.

Likewise, the Government's agreement not to seek an enhancement under 21 U.S.C. § 851 if Defendant pled guilty is also a normal practice of the Government, recently rejected as retaliatory and unconstitutional by the United States Attorney General, which also cannot be contributed as a significant balancing factor in concluding that Defendant's sentence was based on the Sentencing Guidelines.

In essence, if Defendant would have pleaded guilty, even without the Rule 11(c)(1)(C) agreement, his sentencing range would have been 188-235 months imprisonment, potentially 8 months more than the term agreed upon pursuant to Rule 11(c)(1)(C). Wherefore, based on this calculus, it is unequivocal that the parties agreement to a sentence of 180 months imprisonment was based on the Sentencing Guidelines, and the sentencing range anticipated by the Sentencing Guidelines.

This is so because the policy statement accompanying § 3582(c)(2) states that "[i]f the original term of imprisonment imposed was less than the term of imprisonment provided by the guidelines range applicable to the defendant at the time of sentence (8 months in this case), a reduction comparably less than the amended guidelines range (151-188 months in this case) ... may be appropriate. Although a comparable reduction of 8 months would constitute an amended Rule 11(c)(1)(C) sentence of 143 months, Defendant conservatively maintains that a reduction to 150 months, the lesser tenth, would sufficiently uphold the terms of the Rule 11(c)(1)(C) agreement underlying. *See Appendix A hereto.*

CONCLUSION

Wherefore, for all of the foregoing reasons, Defendant prays this Honorable Court grant the relief sought herein, and reduce Defendant's sentence to a term of 150 months, which would constitute 1 month less than the otherwise applicable Guidelines range.

Dated: June 8, 2015

Respectfully Submitted,
/s/ Erik Hughes
Erik Hughes #65026-019
Defendant, pro se
FCI Jesup
2680 US Hwy 301 South
Jesup, Georgia 31599

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served upon Assistant U.S. Attorney Angela Marie Garland, at the Office of the U.S. Attorney, Northern District of Georgia, Rome Division, by U.S. Mail, this 7th day of June 2015.

Respectfully Certified,
/s/ Erik Hughes
Erik Hughes #65026-019
Defendant, pro se